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# Federal Communications Commission Record

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**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MELBOURNE INTERNATIONAL

COMMUNICATIONS LIMITED

Application for authority to acquire and operate facilities via the PAS satellite system for provision of services between the United States and various overseas points. File No. I-T-C-95-029

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: February 24, 1995; Released: March 6, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-029 IS GRANTED, and Melbourne International Communications Limited (MICL) is authorized to:

a. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in the Appendix hereto, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in the Appendix hereto, furnished by its correspondents;

b. lease and operate necessary connecting facilities in the United States;

c. lease a one-half interest in and operate any necessary overseas connecting facilities; and

d. use the facilities authorized in a, b, and c above to provide MICL's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A, B, and C.

3. IT IS FURTHER ORDERED that neither MICL nor any persons or companies directly or indirectly controlling or controlled by MICL, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MICL or any persons or companies controlling or controlled by MICL are parties.

4. IT IS FURTHER ORDERED that our authorization of MICL to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, MICL may not -- and MICL's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, or PAS-4, satellite.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

**APPENDIX**

MICL is authorized to lease and operate six 64-kbps voice-grade circuits between the United States and each of the following points, INTERCONNECTED with the public switched network:

**PAS-1**

**C-band countries**

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

**Ku-band Countries**

Azerbaijan
Bahamas
Czech Republic
Portugal
Romania
Russian Federation
United Kingdom

**PAS-2**

United Kingdom

**PAS-4**

Australia
Hong Kong
New Zealand

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SEQUEL CONCEPTS, INC. File No. I-T-C-95-045

Application for authority to acquire and operate facilities for service between the United States and the Philippines.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: February 24, 1995; Released: March 6, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and the Philippines by Sequel Concepts, Inc. (Sequel).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-045 IS GRANTED and Sequel is authorized to:

a. acquire from AT&T on an Indefeasible Right of User basis one-half interests in and operate 96 voice-grade circuits in the HAW-4, TPC-3 and GPT Cable Systems;

b. lease and operate any necessary domestic connecting facilities; and

c. use said facilities to provide Sequel's regularly authorized services, including switched voice and data and private line services, between the United States and the Philippines.

3. IT IS FURTHER ORDERED that our authorization of Sequel to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the Philippines -- that is, private lines which originate in the United States and terminate in the Philippines or which originate in the Philippines and terminate in the United States. In addition, Sequel may not -- and Sequel's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Philippines end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the Philippines affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992). *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sequel nor any persons or companies directly or indirectly controlling or controlled by Sequel, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sequel or any persons or companies controlling or controlled by Sequel are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP.

Application for authority to acquire and operate capacity in the Eastern Caribbean Fiber System. File No. I-T-C-95-048

**ORDER AND AUTHORIZATION**

**Adopted: February 24, 1995; Released: March 6, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-048 IS GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. acquire on an ownership basis, activate, and operate capacity in the Eastern Caribbean Fiber System (ECFS Cable);

b. lease a one-half interest in and operate any necessary overseas connecting facilities;

c. multiplex, through the use of Digital Circuit Multiplication Equipment, the bearer channels authorized herein, thereby deriving up to the maximum attainable channels; and

d. use said facilities to provide AT&T's regularly authorized services between the United States and the following points:

| Country | No. of half-MIUs[1] |
|---|---|
| Anguilla | 2 |
| St. Kitts | 3 |
| Montserrat | 1 |
| Antigua | 3 |
| Guadeloupe | 2 |
| Dominica | 3 |
| Martinique | 3 |
| St. Lucia | 2 |
| Barbados | 3 |
| St. Vincent | 2 |
| Grenada | 1 |

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MA for the ECFS Cable,[2] as well as any Commission Order granting authority to acquire and operate facilities in the Eastern Caribbean Fiber System.

4. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

[1] A MIU is a unit of ownership designated as the Minimum Investment Unit in the ECFS Cable. It is a 2.048 Mbps digital bit stream and consists of two half-interests which are assigned to two correspondents for joint use or to one Party. (See ECFS Cable C&MA).

[2] See attached chart and map from the C&MA for the ECFS Cable.

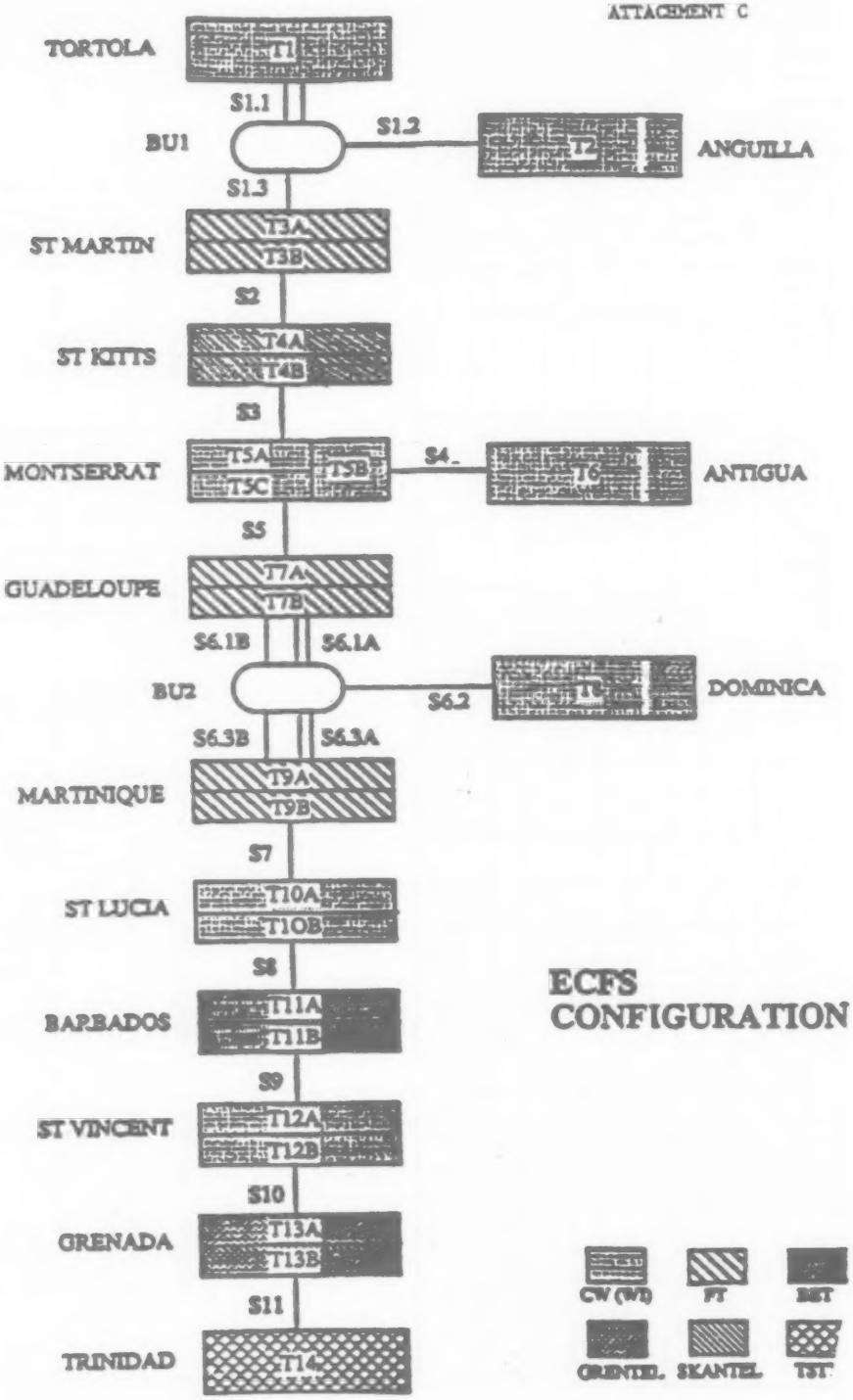
| COUNTRY | SEGMENTS | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | S1.1 | S1.2 | S1.3 | S2 | S3 | S4 | S5 | S6.1A | S6.2 | S6.3A | S7 | S8 | S9 | S10 |
| Anguilla | 2 | 2 | | | | | | | | | | | | |
| St. Kitts | 3 | | 3 | 3* | | | | | | | | | | |
| Montserrat | 1 | | 1 | 1 | 1 | 1** | | | | | | | | |
| Antigua | 3 | | 3 | 3 | 3 | 3** | | | | | | | | |
| Guadeloupe | 2 | | 2 | 2 | 2 | | 2 | | | | | | | |
| Dominica | 1 | | 1 | 1* | 3 | | 3 | 3 | 3 | | | | | |
| Martinque | 3 | | 3 | 3 | 3 | | 3 | 3 | | 3 | | | | |
| St. Lucia | 2 | | 2 | 2 | 2 | | 2 | 2 | | 2 | 2*** | | | |
| Barbados | 3 | | 3 | 3 | 3 | | 3 | 3 | | 3 | 3 | 3 | | |
| St. Vincent | | | | | | | | | | | | 2*** | 2 | |
| Grenada | 1 | | 1 | 1 | 1 | | 1 | 1 | | 1 | 1 | 1 | 1 | 1 |
| | | | | | | | | | | | | | | |
| Total | 21 | 2 | 19 | 19 | 18 | 4 | 14 | 12 | 3 | 9 | 6 | 6 | 3 | 1 |

* A DCME unit is located at St. Kitts to derive 2 additional MIUs, extended to Dominica via bearer capacity in Segments S3, S5, S6.1A and S6.2.

** A DCME unit is located at Antigua to derive 1 additional MIU, extended to Montserrat via bearer capacity in Segment S4.

*** A DCME unit is located at St. Lucia to derive 2 additional MIUs, extended to St. Vincent via bearer capacity in Segments S8 and S9.

ATTACHMENT C



**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP.

Application for authority to acquire and operate additional capacity in the Asia Pacific Cable Network. File No. I-T-C-95-052

**ORDER AND AUTHORIZATION**

**Adopted: February 24, 1995; Released: March 6, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-052 IS GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. acquire on an ownership basis and operate 3 additional half-MIUs[1] in the Asia Pacific Cable Network, as follows:

| Segment | No. of MIUs |
|---|---|
| Singapore-Kuantan | 1 |
| Singapore-Hong Kong | 1 |
| Hong Kong-Miura | 1 |

b. lease a one-half interest in and operate necessary overseas connecting facilities;

c. multiply the bearer channels authorized herein, through the use of Digital Circuit Multiplication Equipment, to obtain the maximum number of circuits available; and

d. activate and operate these facilities to provide AT&T's regularly authorized services between the United States and points in the Pacific area AT&T is authorized to serve.

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MA for the Asia Pacific Cable Network, as well as any Commission Order granting authority to acquire and operate facilities in the Asia Pacific Cable Network.

4. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

[1] A MIU is a unit of ownership designated as the Minimum Investment Unit in the Asia Pacific Cable Network. It is a 2.048 Mbps digital bit stream and consists of two half-interests which are assigned to two correspondents for joint use or to one Party. (See Asia Pacific C&MA).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TRANSWORLD
COMMUNICATIONS
(U.S.A.), INC.

Application for authority pursuant to Section 214 of the Communications Act of 1934 as amended, to provide international communications services between the U.S. and foreign countries.

File No. I-T-C-93-159

**ORDER AND AUTHORIZATION**

**Adopted: February 24, 1995; Released: March 6, 1995**

By the Chief, Telecommunications Division:

1. The Commission's Order, Authorization and Certificate, released November 19, 1993,[1] granted in part the above-captioned uncontested application. The Commission granted Transworld Communications (U.S.A.), Inc. (Transworld) authority to acquire and operate facilities via the INTELSAT satellite system, but deferred its request to provide service via separate satellite systems, stating that the number of circuits requested far exceeded the number of circuits authorized to be interconnected with the public switched network (PSN) via the PanAmsat and Columbia/TDRS satellite systems.[2]

2. On January 6, 1994, the Commission authorized an increase in the number of circuits to be interconnected with the PSN via separate satellite systems.[3] Transworld now requests that it be granted authority to provide service via the PanAmsat and Columbia/TDRS satellite systems, interconnected with the PSN.

3. In view of the foregoing, we find that the present and future public convenience and necessity require a grant of authority to Transworld to provide service via the PanAmsat and Columbia/TDRS satellite systems.

4. Accordingly, IT IS ORDERED, that Transworld's request is granted, and the Commission's referenced Order, Authorization and Certificate in File No. I-T-C-93-159 is modified and Transworld is authorized to:

a. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

b. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

c. lease and operate any necessary connecting facilities in the United States;

d. lease a one-half interest in and operate any necessary overseas connecting facilities; and

e. use said facilities to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

5. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41 or TDRS-174 satellites.

6. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

7. IT IS FURTHER ORDERED that all other terms and conditions of the Commission's referenced Order, Authorization and Certificate, DA-93-1378, released November 19, 1993, remain the same.

8. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] *See* 8 FCC Rcd 8189 (1993).
[2] *Id.* at note 2.
[3] *See Permissible Services*, 9 FCC Rcd 347 (1994).

## APPENDIX A

### COUNTRIES TO BE SERVED VIA pas (INTERCONNECTED)

Up to six 64-kbps voice-grade circuits between the United States and each of the following points:

**PAS-1-C band**

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

**PAS-1-Ku-Band**

| | | |
|---|---|---|
| Albania | Georgia | Romania |
| Armenia | Hungary | Russian Fed. |
| Azerbaijan | Kazakhstan | Somalia |
| Bahamas | Kyrgyzstan | Tajikistan |
| Belarus | Latvia | Turkmenistan |
| Bosnia | Lithuania | Ukraine |
| Bulgaria | Moldova | United Kingdom |
| Czech Republic | Poland | Uzbekistan |
| Estonia | Portugal | |

**PAS-2**

United Kingdom

**PAS-4**

Australia
Hong Kong
New Zealand

## APPENDIX B

### COUNTRIES TO BE SERVED VIA TDRS (INTERCONNECTED)

Up to six 64-kbps voice-grade circuits between the United States and each of the following points:

**TDRS-41**

United Kingdom
Germany

**TDRS-174**

Hong Kong

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re the Application of

NEW ULM TELECOM, INC. File No. W-P-C-6877

For authority to construct and operate, through an affiliate, cable television facilities in Sanborn, Minnesota which is within its affiliate's telephone service area.

## MEMORANDUM, OPINION AND ORDER

**Adopted: February 28, 1995; Released: March 6, 1995**

By the Chief, Common Carrier Bureau:

### I. INTRODUCTION

1. On August 2, 1993, New Ulm Telecom, Inc. (New Ulm) filed an application for authority to construct and operate cable television facilities through its wholly owned subsidiary, Western Telephone Company (WTC), for the City of Sanborn, Minnesota, which lies within WTC's telephone service area.[1] Although the Communications Act of 1934, as amended ("Act") generally prohibits telephone companies from owning and operating cable facilities within their local service areas, the statute creates an exception from the general prohibition for telephone companies serving rural areas.[2] In its application, New Ulm asserted that the proposed cable system would fall within the rural exception.

2. New Ulm also filed a Request for Special Temporary Authority (STA), in accordance with Section 63.04 of the Commission's rules, 47 C.F.R. § 63.04, to commence construction of its proposed cable facilities during the pendency of its Section 214 application. The Chief of the Domestic Facilities Division of the Common Carrier Bureau granted the STA without prejudice to future Commission action on New Ulm's Section 214 application.[3]

3. Mark Twain Cablevision, L.P., (Mark Twain) filed a petition to deny the Section 214 application and a request for revocation of the STA. New Ulm filed oppositions to both these pleadings. Mark Twain filed a reply to the opposition to its petition to deny the Section 214 application. New Ulm subsequently amended its application to include a copy of a cable franchise, which was granted to WTC on September 28, 1993, by the City of Sanborn.

### II. CONTENTIONS

4. In its Section 214 application, New Ulm certified that the City of Sanborn was a "rural area," as defined by Section 63.58 of the Commission's Rules, 47 C.F.R. § 63.58. New Ulm claimed, therefore, that it was exempt from the cable-telephone cross-ownership restrictions of Section 613 of the Act, 47 U.S.C. § 553, and Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54. New Ulm further asserted that it is entitled to simplified Section 214 consideration of its application under Section 63.09 of the Commission's Rules, 47 C.F.R. § 63.09. New Ulm acknowledged that, as of the date it filed its Section 214 application, WTC had not been franchised to provide cable service, as required by 47 C.F.R. § 63.09. New Ulm stated, however, that the City of Sanborn had indicated that it would approve a franchise for WTC at the City Council's August 3, 1993 meeting. New Ulm stated its intention to provide the Commission with evidence of the franchise agreement after the Council acted.[4]

5. In its petition to deny New Ulm's Section 214 application, Mark Twain contends that, without the franchise agreement in hand, New Ulm's application fails to satisfy the express requirements of Section 63.09(5) of the Commission's Rules and that construction of cable facilities without a franchise violates Section 621(b)(1) of the Act.[5] Furthermore, Mark Twain states that New Ulm had no reasonable basis for predicting that it would be granted a franchise on August 3 and, therefore, has "misstated material facts" in its application in violation of Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.[6] Mark Twain alleges further that although New Ulm must have known that the franchise in fact was not approved at the August 3 meeting, New Ulm failed to inform the Commission that the franchise had not been granted,[7] contrary to Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65. This section requires applicants to correct inaccurate information contained in applications promptly. Mark Twain argues that, under Commission precedent, the need to deter

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[1] Section 214 of the Communications Act of 1934, as amended, requires that a telephone company proposing to construct or operate cable facilities through which it will provide broadcast television programming to file an application for authority to do so. Part 63 of the Commission's rules sets forth the rules with which the application must comply.

[2] 47 U.S.C. § 533(b)(3). Several courts, however, have found the ban unconstitutional. *See e.g., Chesapeake & Potomac Tel. Co. v. U.S.*, 830 F. Supp. 909 (E.D. Va., 1993), *aff'd*, No. 93-2340 (4th Cir., Nov. 21, 1994); *US West, Inc. v. U.S.*, 855 F. Supp. 1184 (W.D. Wash., 1994), *aff'd*, No. 93-35775 (9th Cir., Jan.3 , 1995); *BellSouth Corp. v. U.S.*, No. CV93-B-2661-S (N.D. Ala., Sept. 23, 1994).

[3] *See* letter dated August 5, 1993 from Chief, Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission, to Robert M. Jackson, Esq., granting Special Temporary Authority to New Ulm Telecom, Inc., to begin construction of cable television distribution facilities in Sanborn, Minnesota, File No. W-P-C-6877.

[4] Application at 2-3.9

[5] Section 63.09(5) of the Commission's Rules, 47 C.F.R. § 63.09(5), requires an applicant to present "[c]ertification that [the] Applicant is franchised to provide the service pursuant to Title VI of the Communications Act, and date of franchise." Section 621(b)(1) of the Act, 47 U.S.C. § 541(b)(1), states that "a cable operator may not provide cable service without a franchise."

[6] Petition to Deny at 5.

[7] *Id.* at 6.

such violations justifies denial of New Ulm's Section 214 application.[8] Mark Twain proffers these same arguments in support of its request to revoke New Ulm's STA.[9]

6. New Ulm replies that during the Sanborn City Council meeting held on July 13, 1993, the Council did give New Ulm a reasonable basis for believing that it would approve New Ulm's franchise at the August 3, 1993 meeting. Moreover, New Ulm argues that a franchise may be a precondition to providing cable services under Section 621(b)(1) of the Act, but it is not a precondition to construction of cable facilities in anticipation of providing cable services under that section.[10] New Ulm, therefore, denies that its STA under Section 214 violates Section 621(b)(1). New Ulm acknowledges that a franchise is required for construction, under the terms of 47 C.F.R. § 63.09, but asserts that, under 47 C.F.R. § 63.50, it may amend its application as a matter of right prior to the date the Commission takes final action on that application.[11] New Ulm further asserts that Mark Twain has no standing to challenge its STA because the STA does not harm Mark Twain's position as a provider of cable service in Sanborn, and because the Commission rule providing for the granting of a STA, 47 C.F.R. § 63.04, makes no provision for comment or opposition from the public. Finally, New Ulm certifies that it was franchised on September 28, 1993 to provide cable service in the City of Sanborn.

## III. DISCUSSION

7. Mark Twain has provided no basis for denying New Ulm's application for Section 214 authority. Section 214 of the Act governs construction of interstate lines by carriers. The implementing regulations for that Section, which appear in Part 63 of the Commission's rules, require that a carrier seeking construction authorization for a cable system under the rural exemption certify that it is franchised to provide cable service pursuant to Title VI of the Act. A separate provision within Section 214 empowers the Commission to authorize, on a special temporary basis, the supplement ing of facilities without regard to the Section's other provisions. On August 5, 1993, the Domestic Facilities Division of the Common Carrier Bureau granted New Ulm a STA to begin construction of its cable system. New Ulm's STA was not conditioned on New Ulm receiving a franchise on a date certain. The prospective franchise date specified by New Ulm in its application was not mentioned in the STA authorization. Any further question as to the validity of the STA, in the absence of a franchise agreement, is mooted here by the fact that New Ulm entered into a franchise agreement on September 28, 1993, a few weeks later than New Ulm had originally anticipated.

8. We have not been persuaded that carrier construction of a cable system under the rural exemption and pursuant to Special Temporary Authority prior to the obtaining of a franchise violates the franchise requirements of Section 621(b) of the Act if there was no provision of service at the time. Mark Twain cites *In re Competition*[12] in support of this proposition. Specifically, Mark Twain points to the Commission's statement that a "firm seeking to construct and operate a cable television system must first obtain a franchise...."[13] The question of whether a franchise is required prior to construction was not at issue in the cited case, which was, in fact, a Notice of Inquiry, not an adjudication. Moreover, the cited statement would have to include a disjunction ("construct *or* operate") to require the interpretation given to it by Mark Twain. Finally, Section 621(b) prohibits on its face only provision of cable service prior to receiving a franchise, and there is no allegation that New Ulm was providing service prior to September 28, 1993. This finding is not inconsistent with the proposition that franchising authorities retain jurisdiction to award franchises.

9. The question remains whether New Ulm violated the Commission's Rules by initially misrepresenting and subsequently failing to correct material statements of fact in its Section 214 application and whether such misrepresentation warrants denial of the application. New Ulm clearly indicated in its application that it did not have a franchise to operate in Sanborn. It stated its intention to amend its application by forwarding to the Commission a copy of the franchise agreement when one was obtained. At no time did New Ulm misinform the Commission about the absence of a franchise. We find that New Ulm's somewhat optimistic prediction as to the date on which the Sanborn City Council would approve a franchise does not constitute significant misrepresentation. At no point was the Commission misinformed as to the existence of a franchise. Furthermore, there is no indication of deceptive intent.[14] Rather, the evidence shows that New Ulm did have reason to think the franchise would be approved in August,[15] and the franchise was, in fact, granted in September. Nor is there any pattern of repeated violations or other circumstances

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[8] *Id.* at 8-9. Mark Twain asserts that the following cases support denial of New Ulm's application: *Re Colonial Communications, Inc.*, 4 FCC Rcd. 5969, (ALJ, August 3, 1989) (disqualification of one of several mutually exclusive applications for an FM station construction permit because of material and intentional violation of Section 1.65); *Re Algreg Cellular Engineering*, 7 FCC Rcd. 8686, 8750 (ALJ, December 22, 1992) (denial of cellular applications for "deliberate and egregious" violations of Section 1.65 that caused the Commission to process thousands of applications unnecessarily); *Augusta Radio Fellowship Institute*, 6 FCC Rcd. 340, 345 (ALJ, January 18, 1991) (revocation of radio license for deliberate and repeated violation of Section 1.65 in order to avoid inquiry into matters that licensee knew were relevant to its license qualifications).

[9] Informal Request to Revoke Special Temporary Authority at 2-5.

[10] Opposition to Petition to Deny at 3.

[11] *Id.* at 2.

[12] 5 FCC Rcd. 362 (1989).

[13] *Id.* at 366.

[14] *See Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983) (there was no significant misrepresentation in a single misstatement in dealings before the Commission pursuant to an FM application because there was no deceptive intent); *Arizona Mobile Telephone Co.*, 93 FCC 2d 1147, 1158 (1983) (failure to inform the Commission of matters pertinent to applications for land mobile radio stations in violation of 47 C.F.R. § 1.65 did not justify disqualification because there was no attempt to conceal facts or mislead the Commission).

[15] *See* Opposition to Informal Request to Revoke Special Temporary Authority, Exhibit B, Affidavit of James Jensen, President of New Ulm, and Exhibit C, Letter of Gerald C. Woodley,

reflecting significant carelessness on the part of New Ulm.[16] The Commission will not reject an application for trivial reporting failures.[17]

## IV. CONCLUSION

10. For the reasons stated above, we find that New Ulm's amended application meets the requirements of Sections 63.09 and 63.58 of the Commission's Rules, 47 C.F.R. §§ 63.09 and 63.58. New Ulm has now provided all necessary information and has complied with all procedures required under the special application provisions of Section 63.09. New Ulm has correctly certified that it has been awarded a franchise by the City of Sanborn and that the City of Sanborn is a "rural area" according to the Census Bureau. We further find that granting New Ulm authority to construct and operate its proposed cable system will serve the public convenience and necessity by promoting the growth and development of cable systems and competition in cable communications in conformity with the purposes of Title VI of the Communications Act.[18] New Ulm is therefore entitled, under the provisions of Section 214 of the Act, 47 U.S.C. § 214, to construct and operate, through its affiliate, WTC, cable television facilities in the City of Sanborn, Minnesota. We also find that Mark Twain's Informal Request to Revoke Special Temporary Authority is moot.

## V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the application of New Ulm Telecom, Inc. under Section 214 of the Communications Act of 1934, as amended, to construct and operate cable television facilities in the City of Sanborn, Minnesota, IS GRANTED.

12. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

13. New Ulm Telecom, Inc. is granted thirty-one days from the release date of this order to decline this authorization. Failure to respond within that period will constitute formal acceptance of this authorization.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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Mayor of the City of Sanborn.

[16] *See Merrimack Valley Broadcasting, Inc.*, 55 Radio Reg. 2d 23(1983)( *Merrimack), modified* 99 FCC 2d 681, 683-84 n.9 (1984), (inquiry into a Section 1.65 reporting violation and assessment of comparative demerits is only justified where unreported matters are of decisional significance, an intent to conceal is present or a pattern of repeated violations or other circumstances reflect significant carelessness or inattentiveness).

[17] *Merrimack* at 25.

[18] 47 U.S.C. § 521.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

BURT H. OLIPHANT, PEGGY S. OLIPHANT, L. BRENT OLIPHANT AND JEFFREY S. OLIPHANT (Transferors) — File No. BTCH-930526GE

and

GLENDIVE BROADCASTING CORPORATION (Transferee)

For Transfer of Control of the Licensee of Station KDZN(FM), Glendive, Montana

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 15, 1995; Released: March 7, 1995**

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it the above-captioned application for transfer of control of one hundred percent of the stock of Magic Air Communications Company ("Magic Air"), licensee of KDZN(FM), Glendive, Montana, from Burt H. Oliphant, Peggy S. Oliphant, L. Brent Oliphant and Jeffrey S. Oliphant to Glendive Broadcasting Corporation ("GBC"), and a related request for waiver of 47 C.F.R. § 73.3555(c), the Commission's one-to-a- market rule.[1] GBC is the licensee of KXGN(AM) and VHF television station KXGN-TV, both licensed to Glendive, Montana.[2] The Grade A contour of KXGN-TV encompasses all of Glendive, KDZN(FM)'s community of license.[3] The application is unopposed. As set forth below, we will grant GBC's request for waiver of the one-to-a-market rule.

**WAIVER REQUEST**

2. GBC bases its one-to-a-market waiver request on the Commission's waiver standards adopted in *Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part, ("Second Report and Order Recon.")*, 4 FCC Rcd 6489 (1989). Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination ("top 25 market/30 voice standard"). The Commission also favors waiver requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time (*e.g.*, four months), or that are involved in bankruptcy proceedings. *See* 47 C.F.R. § 73.3555, n.7. Because GBC's waiver request does not meet the top 25 market/30 voice standard or the failed-station standard, GBC seeks review of its waiver request under the case-by-case standard also outlined in the *Second Report and Order*. Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities involved; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. *Second Report and Order* at 1753.[4] In support of its waiver request, GBC submits a detailed showing which addresses each of the five case-by-case factors.

3. GBC first contends that joint operation of the stations will create cost savings and efficiencies of operation. In support, GBC provides a chart listing KDZN(FM)'s current monthly expenses and those expenses that it expects to eliminate as a result of the joint operations. Regarding cost savings, GBC states that it will be able to relocate KDZN(FM)'s studio to the existing KXGN-TV/KXGN(AM) facility and that the three stations will share professional services, utilities, telephone service, advertising and promotional expenses. GBC also asserts that it expects to realize significant economic efficiencies in the sharing of personnel, particularly in the engineering, administrative and management staff. In addition, GBC maintains that it will achieve economic efficiencies by sharing its public affairs director, two full-time news reporters and its existing production staff with station KDZN(FM). In total, GBC predicts that the proposed combination will realize annual savings of $52,500 for the FM. GBC states that those sav-

[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[2] Presently pending before the Commission is an application filed by KYUS Broadcasting Corporation ("KBC") to acquire KYUS-TV (ABC), Channel 3, Miles City, Montana, and a proposal to operate KYUS-TV as a satellite of KXGN-TV (File No. BALCT-940314KF). GBC's sole shareholder also wholly owns KBC.

[3] In 1990, the Commission granted GBC a waiver of the one-to-a-market rule when it acquired the "grandfathered" TV and AM combination finding that a waiver grant would not reduce diversity given the longstanding common ownership of those facilities. *See Glendive Broadcasting Corporation*, 5 FCC Rcd 2936, 2937 (1990). GBC acquired those stations from a licensee who had operated the stations jointly for more than thirty years. *Id* at 2936. When the Commission adopted the one-to-a-market rule in 1970, it "grandfathered" combinations such as KXGN-TV and KXGN(AM). *See Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 FCC 2d 306 (1970), *reconsidered in part*, 28 FCC 2d 662 (1971).

[4] Not all five factors under the case-by-case standard will be relevant in every case. 4 FCC Rcd at 6491.

ings will allow GBC to hire an additional part-time employee to expand the public service programming of both KXGN(AM) and KDZN(FM).

4. GBC also contends that programming benefits will result from the stations' joint operation. Specifically, GBC reports that its full-time public service director will direct KDZN(FM)'s public service programming and that GBC will produce a new half-hour weekly public affairs program on KDZN(FM).[5] Furthermore, GBC indicates that the acquisition of the FM station will allow it to broadcast additional local high school and college sporting events that conflict with sports programming currently broadcast on KXGN(AM).

5. Second, regarding the technical facilities involved, GBC states that KXGN-TV (CBS/NBC) is a VHF facility operating on Channel 5 at 14.8 kW effective radiated power ("ERP") from an antenna height of 500 feet above average terrain ("HAAT"). KXGN(AM) is a Class C facility operating non-directionally on 1400 kHz at 1 kW daytime, 250 watts nighttime. KDZN(FM) is a Class C3 facility operating on 96.5 MHz at 25 kW ERP from an antenna height of 400 feet HAAT.

6. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, GBC affirms that, aside from KXGN-TV and KXGN(AM), it owns no other broadcast stations in Glendive. As noted *supra*, GBC reports that on March 14, 1994, its sole shareholder filed an application to acquire KBC, the licensee of KYUS-TV, Miles City, Montana. In that application, GBC proposes to operate KYUS-TV as a satellite of KXGN-TV. Although the Grade B contours of KXGN-TV and KYUS-TV overlap, GBC indicates that KYUS-TV does not place a Grade B contour over Glendive.

7. Fourth, with regard to the economic status of the proposed combination of stations, GBC asserts that the subject stations serve a community that "has experienced severe economic hardship" for some time. GBC reports that Glendive's population has declined since the 1980 census from over 10,000 people to less than 4,500, causing many businesses to close, relocate or merge.[6] GBC contends that the economic conditions present in Glendive make the "likelihood of financial success improbable, if not impossible," for KDZN(FM) and that the station's billings have "declined steadily for over one year, and the trend appears likely to continue." In support, GBC offers Magic Air's tax returns for the years 1986-1993 and a revenue statement for the period through the third quarter of 1994. According to these documents, Magic Air's operations have provided the following annual net income since beginning operations in 1986:

| Year | Net Income |
|---|---|
| 1987 | $ 3,482 |
| 1988 | $ 2,602 |
| 1989 | $ 14,967 |
| 1990 | $ 1,305 |
| 1991 | $ 17,432 |
| 1992 | $ 17,564 |
| 1993 | $ 6,993 |

8. Through the third quarter of 1994, Magic Air reports that it has posted net operating income totaling $132 and that it would have shown a net loss for the three quarters had Magic Air not terminated two full-time employees.[7] Magic Air also states that in the years 1992, 1993 and 1994, its majority shareholders "loaned back" to the corporation the previous year's net profits for operating capital and that, since returning KDZN(FM) to the air in 1986, Burt Oliphant has not drawn a salary from the station's operations. Magic Air argues that if Burt Oliphant had received a salary during that period, the company would have correspondingly shown a net operating loss. Magic Air further contends that if the Commission does not grant the instant transfer, KDZN(FM) will be "forced to go off the air by January 1, 1995 due to continued financial losses." It notes that despite two years of listing KDZN(FM) with media brokers, GBC is the only *bona fide* purchaser that Magic Air has been able to identify for KDZN(FM).[8] With respect to its current stations, GBC provides no specific information regarding the finances of KXGN-TV. GBC does report, however, that KXGN(AM) could not operate without the support received from KXGN-TV. GBC notes that KXGN(AM) has suffered losses over each of the past three years and that in the eleven months ending August 31, 1994, KXGN(AM) posted a net operating loss of more than $50,000.

9. The fifth factor concerns the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately owned and operated broadcast "voices" in the market, and the presence of cable and non-broadcast media. GBC states that Glendive is now included within the Minot-Bismarck-Dickinson, ND-Glendive, MT ADI [Arbitron Area of Dominant Influence] -- ranked 152nd in 1994 -- and that 15 TV stations, including KXGN-TV are included in that ADI. However, GBC suggests that "the relevant market realistically must be considered" the former Glendive ADI "since few of the television and radio stations licensed to Bismarck, ND, and Dickinson, serve Glendive."[9] Utilizing

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[5] GBC states that its proposed new program, "Let's Talk About It," would air on Tuesday mornings at 9:30 a.m. on KDZN(FM). GBC indicates that the weekly program will focus on issues of importance to Glendive.

[6] Magic Air provides a list of sixty-eight Glendive-area businesses that have closed in the past several years due to the region's declining economy. In 1990, the Commission specifically noted that the Glendive area was "suffering through a depressed agricultural economy and a downturn in the business community caused by falling oil and gas prices." *Glendive Broadcasting Corporation, supra*, at 2937. GBC asserts that Glendive's poor economic conditions remain unchanged since that decision.

[7] Magic Air states that the station is presently staffed by Mr. Oliphant, Mrs. Oliphant and one part-time employee. Magic Air also states that a portion of the advertising revenue collected during the third quarter of 1994 represents collection on existing accounts receivable and that new advertising sales continue to decline.

[8] Magic Air indicates that in 1986 it purchased the then-silent KDZN(FM) out of bankruptcy for $100,000. During the two-year period in which the station was offered for sale by media brokers, Magic Air contends that it reduced the station's asking price by $35,000, eventually accepting GBC's offer for $140,000.

[9] GBC states that KXGN-TV was the only television station listed in the former Glendive ADI. In 1989, Arbitron eliminated the Glendive ADI -- which consisted of the counties of Dawson and Prairie, Montana -- and folded Glendive into the Minot-Bismarck-Dickinson, ND-Glendive, MT ADI. K

the former ADI market, GBC also states that there are 6 AM stations and 4 FM stations that "currently provide service to Glendive."[10] Additionally, GBC indicates that 1 FM translator, 3 cable systems with a penetration rate of 80%, 4 low-power television stations and a twice-weekly newspaper serve the two-county Glendive area. GBC asserts that even though the size of the market imposes limitations on the number of "voices" available, allowing it to acquire KDZN(FM) will not "create an excessive concentration of mass media control in the Glendive area."

## DISCUSSION

10. In evaluating a request for a waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491. The Commission has recognized that "[i]n smaller markets, where competition is usually more limited, of particular importance would be demonstrated financial difficulties and the practical question of whether a waiver grant . . . would in fact increase or decrease the vigor of competition and diversity in the market." *Id.* at 6491-6492. We find that GBC's showing in support of a waiver of the one-to-a-market rule meets our case-by-case criteria, and that a waiver in this instance is consistent with the public interest.

11. *Potential Benefits.* GBC has shown that joint operation of the stations will result in significant cost savings as well as the potential for enhanced programming and service benefits. GBC estimates that the proposed combination will result in cost savings of $52,000. Of particular importance is that GBC proposes to apply a portion of proposed savings to enhance the public service programming on KDZN(FM). *See Second Report and Order*, 4 FCC Rcd at 1753 (small market broadcasters may take advantage of savings to improve program service); *see also Tulsa 23*, 5 FCC Rcd 727, 728 (1990) (waiver granted where efficiencies allow for creation of specific news, public affairs, and children's programs). As noted, KDZN(FM) will, under the proposed combination, have the benefit of services from GBC's current full-time public affairs director. Furthermore, GBC has committed to hire at least one additional part-time employee to handle public service programming for the radio stations and to create a new weekly program specifically designed to respond to the needs of Glendive. In addition, GBC reports that the acquisition of KDZN(FM) will permit GBC to broadcast local high school and college sports programming that currently conflicts with the sports programming GBC now offers on KXGN(AM).

12. *Technical Facilities.* All three facilities involved here are relatively modest. Station KDZN(FM) is a Class C3 FM, the second least powerful FM facility permitted under our rules. Magic Air contends the coverage limitations of that signal prevent KDZN(FM) from competing for listeners in communities other than Glendive, while other higher-powered stations from those communities compete for listeners in Glendive. GBC's facilities, KXGN-TV and KXGN(AM), are also lesser-powered facilities. Where the maximum-powered Channel 5 facility is 100 kW from 610 meters HAAT, KXGN-TV operates at only 14.8 kW from 150 meters HAAT. Station KXGN(AM), licensed at 1 kW day, 250 watts night, similarly operates at less than the maximum Class C' facilities of 1 kW day, 1 kW night.[11]

13. *Media Outlets.* Other than KXGN-TV and KXGN(AM), GBC owns no other media interests in Glendive. We have noted that GBC's sole shareholder has an application pending to acquire KYUS-TV in Miles City, a community located approximately sixty miles from Glendive. KYUS-TV's predicted Grade B contour overlaps the predicted Grade B contour of KXGN-TV and GBC requests a waiver to operate KYUS-TV as a satellite of KXGN-TV. GBC states, however, that because of terrain conditions, the stations' Grade B contour overlap is "theoretical" and that within the predicted overlap area, the population consists only of a "few dozen homes." Furthermore, GBC reports that KYUS-TV does not place a Grade B contour over Glendive and that KYUS-TV is not included within the Minot-Bismarck-Dickinson, ND-Glendive, MT ADI, nor within the former Glendive ADI.[12] Given these facts, we find that KYUS-TV is not a Glendive media outlet.

14. *Financial Difficulties.* The subject waiver request clearly establishes that KDZN(FM) is in a precarious financial position. Since purchasing KDZN(FM) out of bankruptcy in 1986, Magic Air's showing indicates that its very modest annual net income has been achieved only by deferral of a principal's salary, the reinvestment of the shareholder's dividends back into the station's operating budget, and the continued reduction of staff. Magic Air's showing also supports its contention that a net loss would have been shown in each year if one of its principals had not accepted the salary deferral and that it cannot continue to sustain operations for much longer, even with only its present three-person staff. Further, GBC has demonstrated that KXGN(AM) has sustained losses of more than $50,000 for the eleven months prior to August of 1994 and survives only due to the efficiencies achieved through combination with KXGN-TV. Finally, the waiver request demonstrates that economic conditions in the region continue to deteriorate. Both GBC and Magic Air have supplied detailed lists of local advertisers that have closed businesses due to the severe economic recession in that region.[13] In sum, the economic conditions of KDZN(FM) and the market par-

[10] All of the radio stations are licensed to communities in the counties of Dawson and Prairie. Magic Air reports that subsequent to the filing of the instant application, two of the radio stations located in this two-county area, KGCX(AM)/KGCH(FM), Sidney, MT, have gone off the air due to financial difficulties.

[11] The station that GBC's sole shareholder proposes to acquire, KYUS-TV, Miles City, Montana, is a similarly modest facility operating at 10.5 kW from 31 meters HAAT.

[12] KYUS-TV is included within the Billings-Hardin MT ADI. *See Television & Cable Factbook*, Stations Volume, 62 (1994 Edition).

[13] We have in the past considered predictions of future station viability based upon a station's share of a market's shrinking advertising revenue. *See e.g., Tulsa 23*, 5 FCC Rcd 727, 728 (1990) (market advertising revenues declined by $10 million dollars between 1982 and 1986). Unlike stations in larger markets, small market stations do not report advertising revenues to independent accounting firms. Nevertheless, we find that the parties' showings here demonstrate that the number of likely advertisers continues to diminish.

allel other instances in which we have granted a waiver under the case-by-case standard. *See Holston Valley*, 5 FCC Rcd 507 (1990) (waiver granted for small market AM station with 10 month sales revenues totaling only $2,100 and a ten-year history suggesting "it is virtually a failed station"); *see also Tulsa 23*, 5 FCC Rcd 727, 728 (1990).

15. *Competition/Diversity*. Analysis of the subject waiver request's impact upon competition and diversity requires us to focus on Glendive, a relatively small community located within the large Minot-Bismarck-Dickinson, ND-Glendive, MT ADI.[14] Typically, in the context of a one-to-a-market waiver, the Commission will determine the number of competing broadcast stations by considering the "relevant ADI TV market for TV stations" and the "relevant TV metro market for radio stations." *Second Report and Order*, 4 FCC Rcd at 1760, n.101. The Minot-Bismarck-Dickinson ND-Glendive, MT ADI consists of 15 TV stations operated by 5 separate owners. As GBC points out, however, where, as here, the ADI covers a large area and the subject stations compete only in the local community, we have centered our inquiry on the local community rather than the ADI. *See Duane J. Polich ("Polich")*, 4 FCC Rcd 5596, 5597 (1989) (Pullman, Washington). GBC's waiver request suggests that using the former Glendive ADI for counting television stations more "realistically" reflects the relevant market and, under the circumstances presented in this case, we agree. Because KXGN-TV is the only television station to place a Grade B contour over Glendive, this approach results in a market consisting of 1 television station.[15] Regarding the relevant market for radio stations, Arbitron does not define a TV metro market for Glendive, nor does it define a metro radio market for Glendive. We therefore find the relevant radio market to consist of the 10 radio stations that GBC has identified as serving and competing for advertising dollars in Glendive.[16] *Compare Polich* at 5597 (relevant radio market consists of stations competing for listeners in Pullman). Of those 10 radio stations, 7 separately owned and operated radio stations would serve Glendive after the proposed combination.

16. Thus using either the analysis outlined in the *Second Report and Order* or the alternative analysis proposed by GBC, it is clear that Glendive, like many small markets, is served by relatively few broadcast voices. Under the method for counting television stations set forth in the *Second Report and Order*, the total number of post-combination broadcast stations is 25 (15 TV stations and 10 radio stations), operated by 12 separate owners. Including only the television stations placing a Grade B contour over Glendive, as GBC suggests, the total number of post-combination broadcast stations is 11 (1 TV station and 10 radio stations), operated by 8 separate owners. Given the limited number of "voices" present, Glendive's acquisition of KDZN(FM) will clearly have an impact on competition and diversity in Glendive. However, in view of the 7 other competing radio stations, 1 FM translator station, 4 low-power television stations, 1 newspaper and the high penetration of cable in the market (80%) GBC's acquisition of KDZN(FM) will not likely result in dominance by GBC of the Glendive market. Equally as important, grant of the assignment application may well be the only means of preventing the loss of KDZN(FM)'s "voice" altogether, a result that would hardly serve diversity.

## CONCLUSION

17. We conclude that the subject request for waiver of our one-to-a-market rule meets our public interest case-by-case criteria. The waiver showing indicates that joint operation of the stations will yield significant cost savings critical to the continued operation of KDZN(FM) by co-locating the facilities and sharing expenses and personnel. The parties have further demonstrated that cost savings will allow for additional public service programming benefits for listeners in the Glendive area. All three technical facilities are modest for their respective classes. Magic Air has demonstrated that KDZN(FM) is in financial distress and that no one, other than GBC, has offered to buy the station in the two-year period that the station has been offered for sale. In the past, we have acknowledged the importance of a small market station's financial difficulties in granting similar waiver requests. *See Holston Valley*, 5 FCC Rcd 507, 508 (1989). Finally, considering the totality of the information presented, and in view of the availability of other radio service received in Glendive, the high rate of cable television penetration in the market, and the newspaper and other broadcast media available, we conclude that the preservation of the KDZN(FM) service and potential enhancement in programming services outweigh the reduction of diversity and competition that would result from grant of the subject waiver request.

18. Accordingly, IT IS ORDERED, That the request for waiver of 47 C.F.R. § 73.3555(c) by Glendive Broadcasting Corporation IS GRANTED. IT IS FURTHER ORDERED, That upon finding the applicants otherwise qualified, the application for transfer of control of Magic Air Communications Company, licensee of KDZN(FM), Glendive, Montana, from Burt H. Oliphant, Peggy S. Oliphant, L. Brent Oliphant and Jeffrey S. Oliphant to Glendive Broadcasting Corporation IS GRANTED.

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[14] This ADI is comprised of 134,700 TV households, of which only 13,700 households are within KXGN-TV's service area. *See Television & Cable Factbook*, Stations Volume, No. 62 (1994 Edition).

[15] In our previous consideration of a one-to-a-market waiver request in Glendive (see note 3, *supra*), we noted that while three other VHF stations placed a predicted Grade B contour over portions of the two-county former Glendive ADI, only KXGN-TV placed a Grade B contour over Glendive. *See Glendive Broadcasting Corporation*, 5 FCC Rcd 2936, 2937 n.2 (1990).

[16] Of the 6 AM stations and 4 FM stations, 3 stations are licensed to Glendive and the remaining 7 stations are licensed to Sydney, MT, Baker, MT and Miles City, MT. The Commission's records indicate that two of the radio stations in the relevant market, KGCX(AM)/KGCH(FM), have been off the air since August 3, 1993 pursuant to special temporary authority to remain silent. On November 10, 1994, the stations' licensee filed a request with the Commission to extend that authority for an additional six months to permit the completion of negotiations with an interested buyer. Because of KGCX(AM)/KGCH(FM)'s likely return to service, we will continue to include those stations in our analysis.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: In re Application of Burt H. Oliphant, Peggy S. Oliphant, L. Brent Oliphant and Jeffrey S. Oliphant and Glendive Broadcasting Corporation For Transfer of Control of the Licensee of Station KDZN(FM), Glendive, Montana (Memorandum Opinion and Order)

This Memorandum Opinion and Order grants a one-to-a-market waiver to Glendive Broadcasting Corporation ("GBC") for the acquisition of KDZN(FM), Glendive, Montana. While I have supported Commission authorization of one-to-a-market waivers in the past,[1] I must concur in this decision.

My reservations with regard to this decision, center on the overall impact of such waivers on diversity and competition.[2] As the facts presented in this matter do not satisfy our top 25 television market/30 broadcast voice or our failed station standards, this case must be evaluated under our case-by-case waiver standard. Under this standard, I am only haltingly persuaded that the facts in this case, taken in the aggregate, support the grant of a one-to-a-market waiver. Yet, I believe that this case, while by its nature is difficult, still raises concerns about the extent to which the Commission should limit the grant of one-to-a-market waivers, particularly where serious diversity and competitiveness issues are present.[3]

Upon evaluation, this matter raises several issues. Of the factors considered by the Commission in evaluating case-by-case waiver requests, the potential benefit for GBC as a result of the joint operation of KDZN(FM) with KXGN(AM) and KXGN-TV, the financial difficulties of KDZN(FM), and the potential for a resulting failed station are highlighted as justifications for

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[1]See, e.g., Midwest Communications, Inc., 7 FCC Rcd 159 (1991); Micronesia Broadcasting Corp., 6 FCC Rcd 984 (1991); WHDM-AM, Inc., 6 FCC Rcd 4329 (1991); and Kyles Broadcasting Ltd., 5 FCC Rcd 5846 (1990).

[2]See, Dissenting Statement of Commissioner Andrew C. Barrett (KEZV(FM), Spearfish, South Dakota; One-to-a-market Waiver) adopted March 16, 1992.

[3]Id.

this waiver grant.[4] Moreover, I recognize the severe economic ramifications for business that stems from a declining population.[5] While I am sympathetic to these problems and believe that economic efficiencies could result from the proposed consolidation,[6] I question the extent to which these factors should outweigh all other considerations including diversity and competition.

Moreover, I remain concerned that such consolidations could create an undue concentration of mass media control in relatively smaller markets. Although, Glendive's ADI was ranked 152nd in 1994, this is based on its inclusion within the Minot-Bismark-Dickinson, North Dakota-Glendive Montana ADI. In actuality, the number of voices serving Glendive is fewer than this ADI would indicate. Although fifteen TV stations are included in this ADI, only one, KXGN-TV, which is owned by Glendive Broadcasting Corporation, is licensed to serve the Glendive community.[7] Additionally, the relevant radio market consists of 10 stations, of which only 7 will be separately owned and operated after the waiver grant.[8] Given the limited number of voices present,[9] and the size of the relevant market, Glendive Broadcasting Corporation's acquisition of KDZN(FM) could have a significant impact on diversity and competition in the Glendive area.

Thus, in light of these concerns, I concur in this Commission decision.

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[4]See, Memorandum Opinion and Order at 9. The unsuccessful efforts to sell the station over a two-year period have not gone unnoticed.

[5]Id. at 3. According to GBC's pleadings, the 1980 Census indicated that Glendive's population which at one time exceeded 10,000 dropped to less than 4500.

[6]Id. at 3.

[7]Id. at 8.

[8]Id.

[9]While it is my understanding that channel frequencies are still available in this market, one must wonder whether we are allowing a few players to gain a foothold in the Glendive area that will deter future station investment in this market.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

Pittsburgh Partners, L.P., Assignor — File No. BALH-930901GI

and

EZ Pittsburgh, Inc., Assignee

For Consent to Assignment of License of

FM Broadcast Station WQKB
New Kensington, PA

## MEMORANDUM OPINION AND ORDER

**Adopted: February 23, 1995; Released: March 7, 1995**

By the Commission:

1. The Commission has under consideration an application for review filed on April 14, 1994, by Allegheny Communications Group, Inc. ("Allegheny").[1] Allegheny seeks reexamination of the March 15, 1994, action by the Mass Media Bureau ("Bureau") denying reconsideration of the grant of an application to assign the license of WQKB(FM), New Kensington, Pennsylvania, from Pittsburgh Partners L.P. ("Pittsburgh") to EZ Pittsburgh, Inc. ("EZ"). We deny the application for review for the reasons set forth below.

## BACKGROUND

2. On June 28, 1991, Allegheny filed a petition to deny EZ's license renewal application for station WBZZ(FM), Pittsburgh, Pennsylvania.[2] In its petition to deny, Allegheny requested the specification of certain issues relating to EZ's qualifications to be a Commission licensee, including allegations of news distortion, indecency, discrimination, civil misrepresentation and abuse of process. The allegations raised by Allegheny in the petition to deny the license renewal application were considered and rejected in a *Hearing Designation Order*, MM Docket No. 93-88, 8 FCC Rcd 2448 (M.M. Bur. 1993 ) (" *HDO*") .[3]

3. Allegheny petitioned to deny the assignment of WQKB(FM) from Pittsburgh to EZ on October 18, 1993. In its petition, Allegheny argued that the assignment should be denied because EZ is not basically qualified to be a Commission licensee. It cited essentially the same allegations made in the petition to deny the renewal application, including allegations of sexual harassment and discrimination in employment, civil misrepresentation and abuse of Commission processes by EZ. In a March 15, 1994 letter decision, the Bureau denied Allegheny's petition to deny the assignment application, found EZ fully qualified to be a licensee of station WQKB(FM), and granted the assignment.

## DISCUSSION

4. As a preliminary matter, we find that Allegheny lacked standing to petition to deny the assignment application under consideration. Though Allegheny claims it has standing based on its status as a competing applicant for channel 229B at Pittsburgh, Pennsylvania, Commission precedent makes clear that "mere status as an applicant in one proceeding is insufficient to confer standing as a party in interest in a different proceeding." *See, e.g., Theodore Mallyck and Allaun Corp.*, 6 FCC 2d 597 (1967).

5. In any event, as the Bureau correctly noted in its March 15, 1994 letter, if there is a final determination in the WBZZ(FM) renewal proceeding that EZ is in fact not qualified to be a Commission licensee, the Commission will take appropriate action not only regarding WBZZ(FM), but also concerning EZ's other broadcast interests, including the one considered here. Allegheny's contention that, in the meantime, we must not permit EZ to buy other broadcast stations, is without merit.

6. Even when a licensee is designated for hearing on characterissues with respect to one license, the Commission decides on a case-by-case basis whether the licensee may buy or sell other stations or have other authorizations renewed. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), *recon. granted in part, denied in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992). *See also, Character Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987).

7. There is no automatic presumption that "misconduct at one station renders a licensee unqualified to operate other stations." *Straus Communications, Inc.*, 2 FCC Rcd 7469 (1987), *citing 1986 Character Policy Statement*, 102 FCC 2d at 1224.[4] If the Commission has not as an initial matter (*i.e.* in the *HDO)* found that the allegations under consideration involve conduct likely to impact the future operations of other stations, there generally appears to be

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[1] Responsive pleadings include an April 29, 1994, opposition to application for review filed by EZ and a May 11, 1994, reply to opposition to application for review filed by Allegheny.

[2] The WBZZ renewal application is currently pending before the Commission in MM Docket 93-88. Allegheny filed a mutually exclusive application which has been consolidated for hearing in the proceeding.

[3] Allegheny filed a motion for leave to file application for review and an application for review of the *HDO* on May 10, 1993. Allegheny's motion was subsequently denied and the application for review dismissed by the Commission on the basis that the *HDO* was an interlocutory order and Allegheny did not make the requisite showing required under 47 C.F.R. Section 1.115(a)(3) to obtain review of an interlocutory order. *Memorandum Opinion and Order*, MM Docket 93-88, 8 FCC Rcd 8435 (1993).

[4] In *Straus Communications, Inc.*, 2 FCC Rcd. 7469, 7470 (1987) the Commission upheld a Bureau decision to grant an assignment application despite character issues designated against the assignor in another proceeding. In making its determination,

no reason to condition the grant of the application. *See 1986 Character Policy Statement*, 102 FCC 2d at 1223-1225. In appropriate instances, the Commission may nevertheless condition the grant of an application involving a licensee that has been designated for hearing on character issues, *1990 Character Qualifications* 5 FCC Rcd at 3253. However, this is not such a case. In the instant case, where there has been an initial determination in the WBZZ(FM) renewal proceeding that the specification of character issues is not warranted, *see* para. 2 and note 3 *supra*, restricting EZ's ability to acquire other stations would not be justified.

## CONCLUSION

8. ACCORDINGLY, IT IS ORDERED, That the application for review filed on April 14, 1994, by Allegheny Communications Group, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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the Bureau had considered allegations raised in an informal objection to the assignment and balanced the public interest factors involved in light of the allegations raised therein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

DAVIDSON COUNTY BROADCASTING COMPANY, INC.

File Nos. BPH-870227IF
BPH-920218JE

For Construction Permits for Minor Modification of Facilities and for Reinstatement of Expired Permit for Station WWGL(FM) Lexington, North Carolina

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 23, 1995; Released: March 7, 1995**

By the Commission:

1. The Commission has under consideration the petition for reconsideration filed on April 9, 1993 by WWMY-FM Broadcasting, Inc., licensee of Station WNEU(FM), Eden, North Carolina ("WNEU"). WNEU seeks reconsideration of the Commission's action denying its: (1) application for review of the grant of the application (File No. BPH870227IF) for a construction permit for minor modification of facilities of Station WWGL(FM), Lexington, North Carolina ("WWGL"); and (2) petition for reconsideration of the grant of the application (File No. BPH-920218JE) for reinstatement of an expired construction permit for minor modification of the facilities of WWGL. *See Davidson County Broadcasting Company, Inc.*, 8 FCC Rcd 1689 (1993) (*"Davidson I"*). Oppositions to the petition for reconsideration were filed on April 22, 1993 by Davidson County Broadcasting Company, Inc., licensee of WWGL, and on April 29, 1993 by Wake Forest University. On May 10, 1993, WNEU filed a reply to the oppositions.

2. WNEU's arguments repeat contentions which it made and which we rejected in *Davidson I* and therefore do not warrant reconsideration. *See WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965); *Fresno FM Ltd. P'ship*, 7 FCC Rcd 4339 (1992).

3. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §§ 1.106(b)(2) and 1.115(g) the petition for reconsideration filed on April 9, 1993 by WWMY-FM Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

DALE J. PARSONS, JR.
(Assignor)

and File No. BALH-931227GH

HOWARD R. GREEN, RECEIVER
(Assignee)
("Parsons-to-Receiver")

PACIFIC ISLE BROADCASTING, INC.
(Assignor)

and File No. BALH-940906GE

HOWARD R. GREEN, RECEIVER
(Assignee)
("Pacific Isle-to-Receiver")

For Consent to the Involuntary
Assignment of License of
Station KLHI-FM, Lahaina, Hawaii

and

HOWARD R. GREEN, RECEIVER
(Assignor)

and File No. BALH-940610GG

LAHAINA BROADCASTING CO., LTD.
(Assignee)
("Receiver-to-LBC")

For Consent to the Voluntary
Assignment of License of
Station KLHI-FM, Lahaina, Hawaii

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 23, 1995; Released: March 7, 1995**

By the Commission:

1. The Commission has under consideration the Application for Review filed on October 3, 1994 by Dale J. Parsons, Jr. ("Parsons"), licensee of Station KLHI-FM, Lahaina, Hawaii ("KLHI-FM").[1] Parsons seeks review of the action of the Office of General Counsel which, according to Parsons, "revok[ed]" Parsons' license for KLHI-FM. *See Letter from Associate General Counsel to Hon. Geraldine Mund, Bankruptcy Judge*, Ref. No. 1800B3-CJI, dated September 1, 1994 (*"Staff Letter"*). To expedite resolution of the complex issue of who the rightful licensee of KLHI-FM is, we shall on our own motion consolidate and consider the above-captioned applications for Commission consent to the: (a) involuntary assignment of the KLHI-FM license from Parsons to Howard R. Green, Receiver ("Receiver"); (b) involuntary assignment of the KLHI-FM license from the former KLHI-FM licensee, Pacific Isle Broadcasting, Inc. ("Pacific Isle"), to Receiver; and (c) voluntary assignment of the KLHI-FM license from Receiver to Lahaina Broadcasting Co., Ltd. ("LBC"), as well as the voluminous pleadings pertaining to these applications which have been filed with the Commission.[2] For the following reasons, we shall deny Parsons' Application for Review, grant the Pacific Isle-to-Receiver involuntary assignment application, dismiss the involuntary Parsons-to-Receiver assignment ap-

[1] An opposition to application for review was filed on October 18, 1994 (and supplemented on October 24, 1994) by Howard R. Green, Receiver.

[2] These pleadings include: from Parsons (i) Informal Objection to grant of the Parsons-to-Receiver application, filed January 18, 1994; (ii) petitions of support from residents of Lahaina and other communities, dated March 19, March 25, March 26 and April 3, 1994; (iii) "Response to Supplement", filed May 27, 1994; (iv) Supplement to Response to Supplement to Opposition to Informal Objection, filed June 2, 1994; (v) Response to Further Supplement to Informal Objection, filed June 6, 1994; (vi) Response to Supplement to Opposition to Informal Objection, filed June 10, 1994; (vii) Letter to Chief, FM Branch, dated January 31, 1994, requesting issuance of a cease and desist order and imposition of a monetary forfeiture against Receiver; (viii) Informal Objection filed July 8 (and supplemented August 9), 1994 by Virginia Parsons (Parsons' wife); (ix) Informal Objection to grant of Pacific Isle-to-Receiver application, filed September 19, 1994; (x) Petition to Deny the Receiver-to-LBC application, filed July 21, 1994; (xi) Reply to Opposition, filed August 23, 1994; (xii) Letter to Chief, Audio Services Division, filed September 29, 1994; and from Receiver: (i) Opposition to Informal Objection, filed February 4, 1994 and supplemented and/or corrected February 9 ("Declaration of Alan Zee"), March 2, March 14, May 2 and May 19, 1994); (ii) Reply to Response to Supplement, filed June 1, 1994; (iii) Reply to Supplemental Response, filed June 3, 1994; (iv) Reply to Supplemental Response, filed June 16, 1994; (v) Reply, filed July 13, 1994; (vi) Letter filed September 6, 1994, requesting voluntary dismissal of Parsons-to-Receiver application, and Letter filed October 12, 1994, withdrawing the request for dismissal; (vii) Opposition to Petition to Deny the Receiver-to-LBC application, filed August 2, 1994; (viii) Letters to Chief, Audio Services Division, filed September 21 and 29, 1994; and (ix) Letter to Assistant Chief, Audio Services Division, filed September 30, 1994. In addition, on June 29, 1994, a "Request for Emergency Consideration" was filed by the Receiver; a Response to this request was filed on July 8, 1994 by Parsons; a Reply was filed on July 13, 1994 by the Receiver; a Response to Reply was filed on July 21, 1994 (and amended August 18, 1994) by Parsons; and another Response was filed on August 29, 1994 by Receiver. On August 3, 1994, the Receiver filed a "Report to the Commission." On September 30, 1994, Receiver filed a letter addressed to the Assistant Chief, Audio Services Division. On December 23, 1994, the Receiver filed an amendment to the application (see note 16, *infra*). Finally, on January 13, 1995, the Receiver filed a Supplement. We will deny Parsons' request to treat his Informal Objection to the Parsons-to-Receiver application as a petition to deny. A petition to deny does not properly lie against a *pro forma* application seeking involuntary assignment of a station license. *See Daniel Meister, Trustee in Bankruptcy*, 55 RR 2d 1241, 1242-1243 (1984). The Informal Objection will be treated pursuant to 47 C.F.R. § 73.3587.

plication, and grant the voluntary Receiver-to-LBC assignment application. Also, we have considered and, as explained below, shall deny the Receiver's request for special temporary authority and shall direct the Receiver to bring KLHI-FM into full compliance with the Commission's technical rules.

## BACKGROUND

2. On July 20, 1990, the Mass Media Bureau ("Bureau") approved the voluntary *pro forma* assignment of KLHI-FM's license from Kenneth S. Hayashi Corporation ("Hayashi"), owned entirely by Mr. Kenneth S. Hayashi, to Pacific Isle, 70% owned by Mr. Hayashi. On March 21, 1991, the Bureau approved the assignment (File No. BALH-910131GZ) of the station's license from Pacific Isle to Parsons. This assignment was consummated on April 23, 1991, after Hayashi, on March 28, 1991, filed for protection under Chapter 11 of the U.S. Bankruptcy Code.

3. On September 17, 1991, the Bankruptcy Court converted the Chapter 11 proceeding to Chapter 7 status and appointed Gary A. Plotkin as Trustee ("Trustee") for Pacific Land Sales, Inc., the renamed debtor. In August, 1992, the Trustee filed an Adversary Proceeding in the Bankruptcy Court, alleging that Parsons acquired KLHI-FM "from an alter ego shell corporation of the Debtor by way of a fraudulent post-petition transfer."

4. On December 10, 1993, the Trustee filed an emergency motion for the appointment of a receiver for the station, alleging that Parsons "defaulted on all payment obligations pursuant to the Purchase Agreement . . . by failing to tender any further payment to Pacific Isle, Martin, Hayashi or the Debtor for the KLHI assets. . . . In total, Parsons paid $60,000 for assets which he agreed to pay a total of $500,000."[3] The Bankruptcy Court appointed Howard R. Green as Receiver for the station on December 21, 1993 and ordered him to take immediate possession of and to operate the station and to seek the requisite Commission approval.[4] Shortly thereafter, with the assistance of United States Marshals, the Receiver took operational control of KLHI-FM and, on December 27, 1993, filed with the Commission the Parsons-to-Receiver involuntary assignment application. However, the court's order was *ex parte*, *i.e.*, Parsons did not participate in that bankruptcy hearing.

5. On April 7, 1994, after Parsons filed a counter-claim and participated in the bankruptcy proceeding, the Bankruptcy Court concluded that "from the time of its incorporation until the sale of KLHI-FM from the Debtor to the Parsons, Pacific Isle was not a valid corporation and was merely the alter-ego of the Debtor.[5] In its associated *Order*, the Court decreed that the transfer of all the assets of KLHI "from Debtor Pacific Land Sales, Inc. f/k/a Kenneth S. Hayashi Corporation by and through its alter-ego Pacific Isle Broadcasting, Inc. [to Parsons] is hereby avoided and set aside pursuant to Bankruptcy Code Section 549, subject to the approval of the FCC."[6] In addition, as authorized by the Bankruptcy Court, Receiver filed on June 10, 1994 the above-captioned application to assign the KLHI-FM license to LBC.

6. The Office of General Counsel's letter to the Bankruptcy Court interpreted the decisions of the Bankruptcy Court to have determined that the Bureau-authorized license assignment to Parsons was never lawfully consummated. *Letter from Associate General Counsel to Bankruptcy Judge*, Ref. 1800B3-CJI, dated September 1, 1994 (*"Staff Letter"*). That letter further indicated that the Commission's records would be corrected to indicate that the current licensee of KLHI-FM is Pacific Isle (and not Parsons). Finally, the letter advised the Receiver to request dismissal of the December 27, 1993 application to assign the KLHI-FM license from Parsons to the Receiver and to file a new "short form" application for Commission consent to the involuntary assignment of KLHI-FM from Pacific Isle to the Receiver. On September 6, 1994, the Receiver requested dismissal of the former application and filed the latter application. However, on October 12, 1994, the Receiver withdrew his request for dismissal, requesting that both applications remain pending.

7. Parsons has filed an Application for Review of the *Staff Letter*, Informal Objections to both involuntary assignment applications, and a Petition to Deny the application for voluntary assignment of the KLHI-FM license from Receiver to LBC. In these pleadings, Parsons contends that he, and not Pacific Isle, is the current licensee of KLHI-FM, and that the license for KLHI-FM may not be assigned from him without affording him a revocation hearing pursuant to Section 312 of the Communications Act, 47 U.S.C. § 312. Parsons also challenges the findings of the Bankruptcy Court.

## DISCUSSION

8. *Pacific Isle-to-Receiver Application.* The *Staff Letter* informed the Bankruptcy Judge:

> We understand your decisions to have determined that [the April 23, 1991] consummation [of the Bureau-authorized license assignment from Pacific Isle to Parsons] was unlawful as violative of the U.S. Bankruptcy Code. Since, if we understand your decisions correctly, the . . . assignment was never lawfully consummated, the Commission's records will be corrected to indicate that the current licensee of KLHI-FM is Pacific Isle . . . and not Parsons.

Subsequently, the staff of the Audio Services Division requested a Bankruptcy Court Order specifically requiring Receiver to take possession from Pacific Isle. *Letter from Chief, Audio Services Division to Receiver*, Ref. 1800B3-CJI, dated September 23, 1994. On September 27, 1994, the staff received a stipulation to this effect between the Trustee and the Receiver which was endorsed by the Bankruptcy Judge.[7] The staff then informed the Judge that,

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[3] Receiver Opp. to Inf. Obj., Att. 3 (*Emergency Motion for The Appointment of a Receiver*, Case No. LA 91-69664-GM, at page 8).

[4] *Id.*, Att. 1 (*Order Appointing Receiver*, Case No. LA 91-69664-GM); *id.*, Att. 2 ( *recon. denied* January 31, 1994).

[5] Receiver Supp. (of May 2, 1994) to Opp. to Inf. Obj., Att. 2 (*Findings of Fact and Conclusions of Law*, at pages 11-12, Case No. LA 91-69664-GM).

[6] *Id.*, Att. 3 (*Judgment*, at page 2, Case No. LA 91-69664-GM) (*"Judgment"*) .

[7] On September 29, 1994, Parsons filed a response to the stipulation but, on October 5, 1994, filed a request to withdraw the response.

"[a]bsent an immediate affirmative indication to the contrary, [it] will construe the stipulation as an Order of the Bankruptcy Court." *Letter from Chief, Audio Services Division to Bankruptcy Judge*, Ref. 1800B3-CJI, released September 30, 1994.[8]

9. Because the Bankruptcy Court has not affirmatively indicated that the staff's interpretation of its decisions is in error, we infer that the interpretation is correct. We shall accommodate the determination of the court that the assets and license of KLHI-FM should be assigned to the Receiver, shall deny the informal objections and shall grant the Pacific Isle-to-Receiver application. *See O.D.T. International (KILU(FM))*, 9 FCC Rcd 2575, 2576 (1994) (*citing LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974)); *Arecibo Radio Corporation*, 101 FCC 2d 545, 550 & n.12 (1985); *D.H. Overmyer Telecasting Co., Inc.*, 94 FCC 2d 117, 126 (1983) (*"Overmyer"*).[9]

10. *Parsons-to-Receiver Involuntary Assignment.* Based on our above finding that Pacific Isle is the current licensee and our decision to grant the assignment of the KLHI-FM license from Pacific Isle to the Receiver, we will dismiss the Parsons-to-Receiver application. The determination of whether a sale of assets amounts to an improper "post-petition transfer" is squarely within the jurisdiction of the Bankruptcy Court. *See* 28 U.S.C. §§ 157 and 1334; *see also* 11 U.S.C. § 549. In this case, the court, after due consideration of Parsons' counter-claim, determined that the original sale of the station and its assets to Parsons was an improper post-petition transfer and ordered the appointment of Receiver to take and maintain possession, custody and control of the station in order to preserve the assets and protect the interests of innocent creditors. *See* Receiver Supp. Opp. to Inf. Obj., filed May 2, 1994, Atts. 2 and 3 (orders of Bankruptcy Judge, dated April 7, 1994).

11. While this case is indeed unusual in that the putative licensee, Parsons, is not the debtor-in-bankruptcy, clearly, the ruling of the Bankruptcy Court must be taken into account. The Commission is obliged to reconcile its policies under the Communications Act with the policies of other federal laws and statutes, including the federal bankruptcy laws in particular. *O.D.T. International*, 9 FCC Rcd at 2576 (*citing LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974)); *Arecibo*, 101 FCC 2d at 550 & n.12; *Overmyer*, 94 FCC 2d at 126. Thus, where a bankruptcy court specifically finds that a prior sale of a station and its assets amounts to an improper post-petition transfer, we believe that the public interest is generally best served by deferring to the findings of the court and approving the involuntary assignment of license to the trustee or receiver so that innocent creditors may receive the full protection afforded by federal bankruptcy law.

12. This principle is analogous to that in *Arecibo*, where a state court ruled that the current licensee had defaulted on his contractual obligations to the previous licensee and ordered that the station's assets be sold at public auction. The principals of the former licensee succeeded in purchasing the assets and, pursuant to an order of the court, filed an involuntary long-form assignment application with the Commission. Because the assignor refused to sign the application, the Marshal of the Superior Court of Puerto Rico, Arecibo Division, signed in its stead, as ordered by the court. We granted the application, finding that such action would fairly accommodate the policies of the Communications Act and state law, would enable the license to accompany the station's physical assets, and would on balance serve the public interest. In this case, the Bankruptcy Court has found that Pacific Isle was an "alter-ego" of the debtor. The Trustee, who in essence stands in the shoes of the debtor,[10] successfully sought appropriate relief from the court. Under these circumstances, the principles of *Arecibo* are controlling.

13. To the extent that Parsons disputes the rulings of the Bankruptcy Court, his remedy lies in an appeal to the appropriate federal court, *see* 28 U.S.C. § 158, and not to the Commission. *O.D.T. International*, 9 FCC Rcd at 2576; *Overmyer*, 94 FCC 2d at 8123. 8 d[11] As we indicated in *Overmyer*, grant of an involuntary transfer application will not prejudice the transferor's pursuit of appellate relief, because the facility will continue to be under the supervision of the bankruptcy court, which, if instructed by a higher court, can order, subject to the prior consent of the Commission, that control of the facility return to the transferor. 94 FCC 2d at 123-124. *See also Arecibo*, 101 FCC 2d at 551 & n.13 (grant of long-form assignment application similarly need not await resolution of appeals).

14. *Receiver's Premature Assumption of Control.* While courts may determine the ownership of physical assets, such as station facilities, the Commission retains exclusive authority to determine who shall be licensed to operate broadcast stations. 47 U.S.C. §§ 301, 303, 307, and 308. *See also Radio Station WOW v. Johnson*, 326 U.S. 120, 131-132 (1945). Thus, we have emphasized that, pursuant to 47 U.S.C. § 310(d), a receiver or trustee is generally required to await Commission grant of its application before assuming control. *Overmyer*, 94 FCC 2d at 127 n.11. In this case, in conflict with Section 310(d) of the Communications Act, the Bankruptcy Court ordered the Receiver to operate the station prior to receiving Commission approval.

15. We strongly disfavor such action, absent extraordinary circumstances. However, we have previously held that the assumption of control by a receiver or trustee prior to Commission consent does not automatically disqualify that person from serving as the temporary operator

[8] The September 30, 1994 letter also indicated that the staff intended to act on the Pacific Isle-to-Receiver application on October 7, 1994. The filing of the instant application for review, however, rendered such staff action inappropriate.

[9] We note that Receiver's September 6, 1994 request to dismiss the Parsons-to-Receiver application, as well as the simultaneously-filed Pacific Isle-to-Receiver application, was filed in response to the *Staff Letter*. The Receiver, however, withdrew his dismissal request in an October 12, 1994 letter, which also requested a waiver of the inconsistent application rule, 47 C.F.R. § 73.3518. In light of our action above dismissing the Parsons-to-Receiver application, we shall dismiss both of Receiver's letters as moot.

[10] *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966). This case interpreted the Bankruptcy Act of 1938. That Act has been superseded by the Bankruptcy Code of 1978 which broadened the powers of the trustee-in-bankruptcy to avoid postpetition transfers of property of the bankrupt's estate. *See generally* 4 *Collier on Bankruptcy* ¶ ¶ 549.01-549.02 (15th ed. 1994).

[11] Although Parsons has filed two appeals, three-judge bankruptcy appellate panels have dismissed those appeals. *See* Receiver Supplement (January 13, 1995), Att. 1 ("Order of Dismissal," BAP No. CC-94-1481 (U.S. Bankr. App. Panel, 9th Cir., filed July 28, 1994)); *id.*, Att. 2 ("Memorandum," BAP No. CC-94-1201-VRiO (U.S. Bankr. App. Panel, 9th Cir., filed December 16, 1994).

of the station. *See Overmyer*, 94 FCC 2d at 126. In this case, the Bankruptcy Court appointed Receiver and ordered him to take immediate control of KLHI-FM based upon Trustee's emergency motion that such action was needed to prevent Parsons from wasting the assets of the station. Two business days after taking physical possession of the station, Receiver filed an involuntary assignment application with the Commission. Parsons filed a counterclaim and motion for reconsideration with the Bankruptcy Court. The court denied reconsideration, finding that the emergency appointment of Receiver was necessary because "the property [was] in danger of being lost, removed or materially injured." Receiver Opp. to Inf. Obj., Att. 2 ("Order Denying Motion for Reconsideration and Modified Order Appointing Receiver," entered Feb. 2, 1994). We find in this case, as we did in *Overmyer*, that extraordinary circumstances, as well as the need to reconcile the actions of the Bankruptcy Court with the Communications Act, excuse the Receiver from his premature assumption of control of the station.

16. *Revocation Issue.* Parsons likens the involuntary assignment of his KLHI-FM license to Receiver to a revocation proceeding and argues that the application may not be approved without first affording him due process rights to a revocation hearing before the Commission pursuant to Section 312 of the Communications Act. Section 312 provides in pertinent part that the Commission may revoke a station license "because of conditions coming to [its] attention which would warrant it in refusing to grant a license . . . on an original application." 47 U.S.C. § 312(a)(2). The statute further provides that, before revoking a license, the Commission must afford the licensee the right to a hearing. 47 U.S.C. § 312(c).

17. We disagree with Parsons' analysis. We have routinely approved involuntary assignments of license in cases where licensees have filed for bankruptcy or where courts have appointed receivers. *E.g., O.D.T. International, supra; Arecibo Radio Corporation, supra; Overmyer, supra; H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973); *see also LaRose v. FCC, supra.* In such cases, no revocation hearing has ever been required. Absent extraordinary circumstances, approval of an involuntary assignment of license serves the public interest by promoting the reconciliation of federal and state policies designed to protect innocent creditors, as discussed above.

18. We note that Parsons, citing *Kirk Merkley, Receiver*, 94 FCC 2d 829 (1983), *recon. denied*, 56 RR 2d 413 (1984) (*"Merkley"*), claims that the Commission policy which generally favors grant of an involuntary assignment of license to a receiver in bankruptcy is predicated on the legal disability of the licensee, a factor it claims is not present in this case. However, the Commission has subsequently disavowed the inference in *Merkley* that the legal disability of the licensee is a prerequisite to Commission approval of an involuntary assignment. *Arecibo*, 101 FCC 2d at 550 n.12. "To the extent *Merkley* suggests that the licensee must be adjudged legally disabled before the Commission will assign a license involuntarily, *see* 56 RR 2d at 417, it does not accurately characterize our policy in this area. Our policy is to accommodate state and local court decrees adjudicating disputes over contract and property rights, unless a public interest determination . . . compels a different result." *Id.* In this case, the public interest does not compel a different result.

19. The *Merkley* case, in which we did not apply the general policy of having the operating authorization accompany the physical assets, involved unusual circumstances. The incumbent licensee was operating with equipment and property which had been acquired in a transaction separate from the one which led to the court proceeding. By court order, the equipment and property being used by the station could not be attached by the court-appointed representative; thus, the incumbent licensee could continue to provide service to the public with its own equipment and property. *Arecibo*, 101 FCC 2d at 550 n.12. In the instant case by contrast, Parsons had obtained the physical assets and license of KLHI-FM in a single transaction. The Bankruptcy Court has held that this transaction was an impermissible post-petition transfer and has ordered that the station's physical assets belong to the bankrupt's estate.[12] Thus, the general policy of having the license accompany the physical assets is fully applicable here.

20. We find that there is no persuasive reason to treat the situation here, involving an adjudicated, avoided post-petition transfer in bankruptcy, any differently. Moreover, we note that Parsons is exercising his right to participate in the bankruptcy proceeding. He has not shown any extraordinary circumstances or otherwise raised any substantial and material question of fact warranting a hearing before the Commission.

21. *STA Request.* Receiver has requested special temporary authority to operate with the existing facilities of KLHI-FM despite certain technical deficiencies. We have carefully reviewed the request but are not persuaded that requiring the Receiver to cure the deficiencies would be unduly burdensome or imperil his ability to keep the station on-the-air. We will therefore deny the request.[13]

## CONCLUSION

22. In sum, we find that the Application for Review, the Petition to Deny and the Informal Objections are without merit and that there are no substantial and material questions of fact warranting further inquiry. LBC's qualifications have not been challenged. Further, based upon our review of the applications, we also find that Receiver and LBC are qualified to be Commission licensees and that grant of the Pacific Isle-to-Receiver involuntary assignment

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[12] *Judgment, supra* note 6, at 2-3.

[13] The Receiver lists the technical deficiencies as: (i) operation without a remote control system required by 47 C.F.R. § 73.1410; (ii) operating an unlicensed booster station which in actuality is an "illegal low-power FM station'"; (iii) operating studio transmitter links not in compliance with current Commission requirements; and (iv) operating after 5:30 p.m. without a duty operator. *See* Request for STA, filed February 4, 1994. We note that the Receiver currently has special temporary authority ("STA") to operate KLHI-FM with its existing facilities. *Letter from Chief, Audio Services Division to Counsel*, Ref. 1800B3-GDG/CJI, dated October 14, 1994. In light of our decision and the determination by the Commission's technical staff that elimination of the technical deficiencies will not be unduly burdensome, we see no reason to extend the STA beyond the thirty day transitional period provided in the ordering clause below.

application and the Receiver-to-LBC voluntary assignment application will serve the public interest, convenience and necessity.[14] Our grants of these applications will be subject to and without prejudice to whatever action, if any, the Commission may deem appropriate in the event the decisions of the Bankruptcy Court are reversed or otherwise modified on appeal. *See Arecibo*, 101 FCC 2d at 551; *Overmyer*, 94 FCC 2d at 123-124.[15]

**ORDERS**

23. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on October 3, 1994 by Dale J. Parsons, Jr. IS DENIED.

24. IT IS FURTHER ORDERED, That the Informal Objections filed by Dale J. Parsons, Jr. and Virginia Parsons ARE DENIED and that the Petition to Deny filed by Dale J. Parsons, Jr. IS DENIED.

25. IT IS FURTHER ORDERED, That the Request for Emergency Consideration filed by Howard R. Green, Receiver IS DISMISSED AS MOOT.

26. IT IS FURTHER ORDERED, That the request by Parsons for issuance of a cease and desist order and imposition of a monetary forfeiture against the Receiver IS DISMISSED AS MOOT.

27. IT IS FURTHER ORDERED, That the September 6, 1994 request by Howard R. Green, Receiver for dismissal of application and his October 12, 1994 withdrawal of that request ARE DISMISSED, and that the application (BALH-931227GH) for involuntary assignment of license of KLHI-FM from Dale J. Parsons, Jr. to Howard R. Green, Receiver IS DISMISSED.

28. IT IS FURTHER ORDERED, That the application (BALH-940906GE) for involuntary assignment of license of KLHI-FM from Pacific Isle Broadcasting, Inc. to Howard R. Green, Receiver and the application (BALH-940610GG) for voluntary assignment of license of KLHI-FM from Howard R. Green, Receiver to Lahaina Broadcasting Co., Ltd. ARE GRANTED.

29. IT IS FURTHER ORDERED, That the request by Receiver for special temporary authority to operate with the existing facilities of KLHI-FM despite certain technical deficiencies IS DENIED; and that the Receiver IS ORDERED to bring KLHI-FM into full compliance with the Commission's technical rules within thirty (30) days from the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[14] In his Petition to Deny the Receiver-to-LBC application, Parsons asserts that the applicants did not submit a copy of their Asset Purchase Agreement. On August 22, 1994, however, the application was amended to supply a copy of the agreement. Therefore, Parsons' argument is moot.

[15] By amendment dated December 23, 1994, the Receiver submitted a "Nunc Pro Tunc Order" of the Bankruptcy Court, entered and filed on December 13, 1994. That Order stated, *inter alia*, "IT IS FURTHER ORDERED the FCC shall forthwith consent to the transfer of the necessary broadcast licenses related to KLHI Radio FM 101.1 to Howard R. Green, as Receiver, and from the Receiver to the Purchaser, Lahaina Broadcasting Company, Ltd. . . ." Our instant action is taken without regard to the Order of the Bankruptcy Court, which lacks authority to order the Commission to act with respect to any particular broadcast licensing proceeding. *See Radio Station WOW v. Johnson*, 326 U.S. at 131-132; *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) (because Communications Act commits review of Commission action to the Court of Appeals, that court has exclusive jurisdiction over suits seeking to compel Commission action); *see also Board of Governors, FRS v. MCorp Financial, Inc.*, 502 U.S. 32, 39-41 & n.11 (1991) (automatic stay provisions of Bankruptcy Code do not apply to ongoing administrative proceedings).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CHANNEL AMERICA LPTV LICENSE SUBSIDIARY, INC.
(Assignor)

AND File No. BAPLTTL-910124JN

ZGS BROADCASTING OF TAMPA, INC.
(Assignee)

Application for Assignment of
License of Station W57BA
Tampa, Florida

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 24, 1995; Released: March 7, 1995**

By the Commission:

1. The Commission has before it an application for review filed by Bahia Honda, Inc. ("Bahia"), licensee of low power television station W61BL, Tampa, Florida, of the staff action on May 31, 1991, denying Bahia's petition to deny and granting the application to assign the license of low power television station W57BA, Tampa, Florida, from Channel America LPTV License Subsidiary, Inc. ("Channel America") to ZGS Broadcasting of Tampa, Inc. ("ZGS"); an opposition filed by Channel America; and a reply by Bahia.

2. ZGS, the proposed assignee, stated in the assignment application that it intended to operate the station with a Spanish-language programming format. Bahia, also a Spanish-language operator in Tampa, filed a petition to deny the assignment alleging that the licensee, Channel America, had never placed the station in operation. Bahia submitted declarations from four individuals which, it claimed, demonstrated that the station had never been on the air. Bahia argued that Channel America had misrepresented to the Commission the operational status of the station; and requested that the Commission either cancel the license for violation of Section 74.763(b) of the Commission's Rules, which requires licensees to operate their stations, or designate the assignment application for hearing.

3. The staff found that Bahia had failed to present a *prima facie* case and had not raised a substantial and material question of fact that grant of the assignment application would be inconsistent with the public interest. The staff concluded that the declarations--by individuals who variously had never seen, heard of, or been told of low power television station W57BA--either were not specific, did not substantiate the allegation that W57BA had never operated, and/or were not based on personal knowledge. The staff, moreover, considered statements by Bahia's engineer as to the condition of Channel America's transmitter to be undocumented opinions. Further, the staff credited Channel America's response which denied the allegations and which contained a sworn declaration from its engineer reciting first-hand knowledge of the history of the construction, operation, equipment failures and ultimate silent status of W57BA. While recognizing that the station had had operational problems and outages in the past, the staff found no basis for cancelling the authorization, or designating the assignment application for hearing. The staff noted that there are no minimum operating hours in the low power television service; that the licensee had since notified the Commission that the station was off the air; and that any outages in the past exceeding the 10-day notification period of Section 74.763(b) did not warrant a hearing.

4. In its application for review, Bahia argues that its allegations were sufficient to make a *prima facie* case, citing *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. 1988). It also claims that the staff erred by resolving questions of credibility and conflicting declarations of fact in Channel America's favor, in order to conclude that no substantial and material question of fact existed. Bahia maintains that the conclusions drawn in the letter with respect to W57BA's operation were beyond the purview of the staff and could only be made as the result of an evidentiary hearing.

5. In order to assess the merits of a petition to deny, a two step analysis is required. First, Section 309(d)(1) of the Communications Act requires that the petition to deny contain specific allegations of fact that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. *See* 47 U.S.C. Section 309(d)(1) and (d)(2). If the petition meets this threshold reqirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. *See Astroline Communications Co. v. FCC*, 857 F.2d at 1561. Even assuming, *arguendo*, that Bahia's allegations established a *prima facie* case, we conclude, in light of the circumstances discussed below, that the matters do not raise any substantial or material questions of fact that would require resolution in a hearing. The staff letter considered Bahia's alleged fact--that station W57BA had never operated--with the declarations and concluded that, although all of the declarations included the broad assertion that station W57BA had never operated, none of them contained sufficient specific facts to support a broadly alleged fact covering a span of two years. Among the failings noted in the declarations were that, in part, they contained opinions based on hearsay information from unnamed parties and one contained information from an independent engineer which confirmed the existence of W57BA's equipment. In addition, as the staff noted, all the declarations had been executed at a time when Channel America conceded the station was off the air. While it could be concluded from their statements that these individuals could not attest to Channel America's operation, that conclusion was not inherently inconsistent with the explanation of Channel America. Thus, the staff could properly conclude that the statements were rebutted by the declaration of the electronics engineer who supervised the construction and installation of station W57BA and was the emergency contact person and repairman for the station. His declaration contained a comprehensive recitiation of station W57BA's construction and operational history since the station went into regular operation. He further declared that he misun-

derstood the Commission's 10-day outage notification requirement and believed that only outages exceeding 30 days had to be reported. Based on this, we agree that Channel America's response sufficiently rebutted Bahia's allegations, no substantial and material question of fact remained and granting the application served the public interest. Additionally, we reject Bahia'a assertion that the staff erred in engaging in "evidence weighing" and disregarded facts in concluding that Bahia had not presented a substantial and material question of fact warranting a hearing. In the second prong of the *Astroline* test, the Commission considers the entire record, weighing a petitioner's showing against the facts offered in rebuttal when deciding whether there is a substantial and material question of fact requiring resolution in a hearing. *Astroline*, 857 F.2d at 1561. If the facts are not disputed, but disposition of a petitioner's claims turns on inferences and legal conclusions to be drawn from facts already known, a hearing is unnecessary. *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972). Moreover, the Commission "may determine how much weight to accord disputed facts based on the record before it." *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). Such analysis permits the Commission to determine'" whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.'" *Id., quoting Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). Against this backdrop, we find the staff's analysis proper and its conclusion fully supported by the materials before us.

6. As to Bahia's other allegation in the petition, that Channel America had misrepresented the operational status of station W57BA, the Commission has held that the duty to come forward with a showing of deception is particularly strong where a misrepresentation issue is sought. *Alabama Citizens for Responsive Public Television, Inc.*, 73 FCC 2d 615 (1979). Since the staff found that there were insufficient grounds for determining that station W57BA never went on the air, there was no basis for specifying a misrepresentation issue.

7. Bahia contended in its reply pleading and again in its application for review that Channel America had falsely claimed (by submitting copies of viewer mail in its opposition to the petition) that residents of non-Tampa locations viewed station W57BA. However, review of the record shows that Channel America claimed only that the viewer mail of four *Tampa* residents corroborated the operations of W57BA during October 1989 and January, February, and May 1990. Additionally, Bahia reiterates its allegation that Channel America's engineer could not have told the truth about the frequency of his visits to the transmitter site. Bahia had previously proferred "roof key logs" which, Bahia's engineer declared, must be signed before anyone could gain access to the roof. The staff properly rejected these showings on the grounds that (1) no supporting affidavit was filed by a person in control of the logs with personal knowledge of the access rules, and (2) Bahia's declarant only signed the log 18 times himself during the 46 weeks in question, although he averred to have visited the rooftop "at least once a week."

8. Bahia's next argument concerns an engineering modification application to the facilities of W57BA which was pending at the time of the previous assignment of W57BA from the original permittee to Channel America. Bahia repeats its claim that the modification application never legally passed to Channel America under the Commission's rules, and must be dismissed.[1] Bahia bases this argument on the grounds that: (1) W57BA was an unbuilt station at that time; and (2) Channel America did not file a separate amendment to the modification application, reflecting its new ownership. The staff held that that rule section was routinely applied to unbuilt construction permits, as well as licensed stations, to allow the transfer of pending modifications; and that Bahia had failed to give any reasons or case precedent to justify its own strict reading of the rule. The staff noted that the rule section in fact refers to "licensee or permittee." Moreover, the staff found that Channel America's failure to amend the specific modification application did not require that application's dismissal. In practice, it noted, an assignment consummation letter is treated as sufficient for that purpose, and results in the assignee's name being routinely substituted on all modifications and applications for the station. Further, the staff cited the wording of the Commission's Consent to Assignment Form (FCC Form 732), which states: "upon consummation the assignor must deliver the permit/license, including any modifications thereof to the assignee." In any event, the staff found that there was no reason for the Commission to penalize Channel America with the severe penalty of dismissal of the modification application for a minor omission. We agree.

9. Alternatively, Bahia now argues that its *prima facie* case is established, even if station W57BA was operating with occasional unreported outages, because, it claims, the Commission "does not intend to announce to all licensees that violations of (the outage-reporting requirement of) Rule 74.763(b), however willful and frequent, will never be disqualifying." However, we agree with the staff determination that, to the extent that there may have been outages in the past exceeding the 10-day notification period of Section 74.763(b), such lapses did not warrant further action under the circumstances presented here. We also conclude that Channel America's conceded outages, under the facts of this case and based on Channel America's explanation, did not warrant a hearing on its assignment application.[2]

10. Finally, we take this opportunity to further address certain other matters raised for the first time by Bahia in its application for review. The arguments raised now do not cause us to change our conclusion. Generally, Bahia faults the staff's reliance on the engineer's declaration, citing various alleged defects or errors in the declaration. First, Bahia argues that Channel America should have offered a statement from one of its principals regarding station W57BA's operation. In the opposition to the ap-

[1] The relevant part of Section 73.3572(b) states: "An application for change in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership."

[2] In any event, Bahia never alleged in its petition to deny that Channel America should be disqualified because of station outages; and, as Channel America argues, Bahia is estopped by Section 1.115(c) from raising such matter at this late date. Moreover, its assertion that the non-reporting of such outages was "willful" is unsupported and does not evidence any intent to deceive the Commission on Channel America's part.

plication for review, Channel America's president, who denies Bahia's charge that the station never operated, responds that the engineer's declaration was submitted because of his own lack of detailed personal knowledge of the station's day-to-day operations, due to distance, minimal on-site visits, and confidence in the engineer's expertise and diligence as station repairman and monitor. We agree with Channel America that the engineer's sworn declaration served to provide the best evidence about W57BA's operations. There is no Commission requirement that only principals may provide verifying declarations. Instead, the emphasis is properly placed upon statements by individuals "with personal knowledge" of the facts (Section 73.3584(b)). Under the circumstances, we agree that the engineer's declaration adequately fulfilled that requirement. Second, Bahia complains that Channel America did not offer a statement from the person charged with monitoring station W57BA. However, Channel America's president confirms that the engineer's official duties included monitoring and repairing W57BA. Third, while Bahia asserts that the engineer never stated that he personally observed the station in operation, review of the declaration shows the engineer declared that W57BA was on the air most of the time during the 23 months since it was licensed.

11. We have fully reviewed the foregoing and find no reason to disturb the staff's ultimate determination that Bahia had failed to raise a substantial and material question of fact that grant of the assignment application would be inconsistent with the public interest. In addition, Bahia has presented no new facts or arguments that would cause us to change that determination.

12. Accordingly, IT IS ORDERED that the application for review filed by Bahia Honda, Inc. IS HEREBY DENIED.

13. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order be sent by Certified Mail-Return Receipt Requested by the staff of the Mass Media Bureau to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-154**

In the Matter of

Amendment of Part 74-E Rules.
Aural Broadcast Auxiliary
Stations.

## REPORT AND ORDER

**Adopted: February 24, 1995; Released: March 7, 1995**

By the Commission:

## INTRODUCTION

1. We herein amend Sections 74.550 of our rules to permit certain unapproved transmitters in the band 944-952 MHz which have been displaced by approved equipment for primary use to be retained for backup purposes at Aural Broadcast Auxiliary Stations.

## BACKGROUND

2. In 1985, the Commission adopted a *Report and Order* in MM Docket No. 85-36 which required all new transmitters for aural studio transmitter-link/intercity relay (STL/ICR) operation in the 944-952 MHz frequency band to be approved prior to marketing. Continued use of existing non-approved equipment was allowed for a period ending on July 1, 1990, which was later extended to July 1, 1993.[1]

3. In June of 1993, the *Notice of Proposed Rule Making*[2] (*"Notice"*) in the above-entitled matter was issued in response to informal suggestions from various parties that the Commission should permit the retention and use of existing unapproved aural broadcast auxiliary transmitters for backup purposes. This proposal would permit broadcasters to retain and use their existing unapproved primary equipment as backup equipment after it was displaced from primary service by approved equipment under the requirements of our rules. The proposal was intended to avoid burdening licensees with additional expenditures to replace infrequently used backup transmitters with approved equipment, and to permit the installation of backup facilities in situations which have not previously been practicable. Backup auxiliary service facilities are used by many broadcast station licensees to avoid undue disruption in programming should the regular auxiliary transmitter fail or require servicing. Thus, the Commission concluded that limited short-term backup use of unapproved equipment could be permitted. The Commission, therefore, proposed to allow all transmitters removed from primary service to be retained for backup purposes, provided no interference is caused and that such transmitters are not used for more than 720 cumulative hours per year without explicit Commission authority.[3] In addition, the *Notice* stated that the Commission would allow licensees to retain unapproved equipment for backup purposes until final action is taken in this proceeding, and thereafter if the proposed rule is adopted.

## COMMENTS

4. Comments supporting adoption of the proposed amendments of Section 74.550 were received from the National Association of Broadcasters ("NAB") and National Public Radio ("NPR"). No opposing comments were received.

5. NAB states that many stations have purchased new equipment to comply with the current requirements of Section 74.550 of the Commission's rules. NAB notes that given the current financial conditions prevailing in the broadcast industry, most licensees cannot justify purchasing additional equipment for backup facilities. However, while their old equipment does not meet the new more stringent standards, NAB and NPR suggest the old equipment is fully functional and is more than adequate for backup purposes.

## DISCUSSION

6. We have reviewed the comments and conclude for the reasons advanced in the *Notice* that adoption of the proposal would serve the public interest. We further agree with NPR that there should not be any significant adverse consequences from continued use of unapproved STL/ICR equipment under the conditions proposed in the *Notice*. These backup transmitters can maintain the broadcast station's ability to provide continued service in the event of primary equipment failure without undue risk of harmful interference. However, we caution licensees that the unapproved equipment has wider channel bandwidth, and thus, may be prone to cause interference, especially in congested spectrum-use areas. Licensees must not use the unapproved equipment on a regular or primary basis and stations using such equipment should be prepared to demonstrate that it normally uses approved equipment. A licensee is not permitted to obtain unapproved equipment from other licensees or other sources for backup use. Our action here is intended only to permit the retention and continued use, in a backup role of equipment that a licensee already possesses.

## PROCEDURAL MATTERS

7. *Regulatory Flexibility Act.* We certify that the regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because there will not be a significant negative economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Pub. L. No. 96-354.94 Stat.1164.5 U.S.C. Section 601 et seq (1981).

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[1] See *Order*, 5 FCC Rcd 738 (1990).

[2] *Notice of Proposed Rule Making*, in MM Docket No. 93-154, 8 FCC Rcd 4106 (1993).

[3] Within the allowed 720 cumulative hours of operation, there are no limits on the amount of permitted consecutive hours or number of separate uses of unapproved equipment.

8. Therefore, IT IS ORDERED that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, that effective [30 days after publication in the Federal Register], Part 74 of the Commission's Rules and Regulations IS AMENDED as set forth in the Appendix. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

9. Further information may be obtained from Bernard Gorden, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**APPENDIX**

Title 47 of the Code of Federal Regulations is amended as follows:

**PART 74 -- EXPERIMENTAL, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES**

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section 74.550 is revised to read as follows:

**§74.550 Equipment authorization**

Each authorization for aural broadcast STL, ICR, and booster stations shall require the use of notified or type accepted equipment. Equipment which has not been type approved under the equipment authorization program and which was in service prior to July 1, 1993, may be retained solely for temporary uses necessary to restore or maintain regular service provided by approved equipment, because the main or primary unit has failed or requires servicing. Such temporary uses may not interfere with or impede the establishment of other aural broadcast auxiliary links and may not occur during more than 720 cumulative hours per year. Should interference occur, the licensee must take all steps necessary to eliminate it, up to and including cessation of operation of the auxiliary transmitter. All unapproved equipment retained for temporary use must have been in the possession of the licensee prior to July 1, 1993, and may not be obtained from other sources. Requirements for obtaining a grant of equipment authorization are contained in subpart J of part 2 of the Rules. Equipment designed exclusively for fixed operation shall be authorized under notification procedure (see §2.904(d) of this chapter).

Note: Consistent with the note to §74.502(a), grandfathered equipment in the 942-944 MHz band and STL/ICR users of these frequencies in Puerto Rico are also required to come into compliance by July 1, 1993. The backup provisions described above apply to these stations also.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

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|---|---|
| Complaints of Maine Public Broadcasting Corporation against A-R Cable Services d/b/a Cablevision | CSR 4397-M<br>CSR 4398-M |

Petitions for Declaratory Ruling and Requests for Carriage

## MEMORANDUM OPINION AND ORDER

**Adopted: February 8, 1995; Released: March 7, 1995**

By the Cable Services Bureau:

## INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") became law.[1] On December 4, 1992, the 1992 Cable Act's requirements for mandatory carriage of certain noncommercial educational stations set forth in §5 of the 1992 Act became effective. On October 6, 1994, Maine Public Broadcasting Corporation ("MPBC"), licensee of noncommercial translator stations W39BQ, Lewiston, Maine, and W30BF, Bangor, Maine, (the "Stations") filed separate petitions for declaratory ruling seeking to ensure the Stations' carriage on A-R Cable Services cable systems (d/b/a Cablevision) ("A-R" or "Cablevision") serving several Maine communities.[2] On December 13, 1994, A-R filed separate oppositions/requests for stay to these complaints.[3] On December 23, 1994, MPBC filed separate replies to these oppositions/requests for stay. We shall jointly consider the two petitions since there is commonality between the parties and the issues.

## SUMMARY OF PLEADINGS

2. In its petitions for declaratory ruling, MPBC explains that it is a 501(c)(3) corporation operating noncommercial educational TV and radio stations throughout the State of Maine. MPBC further explains that W39BQ and W30BF both translate the signal of full power noncommercial educational television station WMEA- TV, Bidderford, Maine[4] and that W39BQ operates with an effective radiated power of 9.2 kilowatts while W30BF operates with an effective radiated power of 33.65 kilowatts. MPBC asserts that both stations serve the cable operator's franchise areas and both stations are considered "local" because their communities of license are within 50 miles of Cablevision's principal headends. MPBC asserts Cablevision has acknowledged that the Stations qualify for mandatory carriage rights on its cable systems but has not yet initiated carriage for either of them. MPBC asks the Commission to issue orders requiring Cablevision to carry W30BF and W39BQ.

3. In its oppositions, Cablevision presents three arguments explaining why it should not be required to carry either W30BF or W39BQ. First, Cablevision submits that WMEA, through the Stations at issue, airs programming substantially similar to that of WCBB, another MPBC noncommercial educational television station already carried on the systems. Cablevision argues that MPBC is simply using the must carry rules to expand the coverage area of WMEA, a non-local station that otherwise would provide no service to the cable communities. Second, Cablevision asserts that granting MPBC's requests would have a significant adverse impact on Cablevision's business. Cablevision explains that carriage of the Stations would result in financial losses related to new equipment expenses, costs of notifications to subscribers, and loss of revenue due to the deletion of a cable programming service.[5] Finally, Cablevision argues that mandatory carriage of the Station's would abridge its First Amendment rights by forcing it to add to its programming line-up "a governmentally favored class of speaker -- a noncommercial educational broadcaster -- in place of a cable programmer whom Cablevision would prefer to carry." In this regard, Cablevision, noting the Supreme Court's remand order in *Turner Broadcasting System, Inc. v. FCC*,[6] asks that the Commission defer consideration of MPBC's petitions until a final determination has been made concerning whether the must carry provisions of the 1992 Cable Act comport with the First Amendment.

4. In its replies, MPBC asserts that Cablevision's arguments challenging W30BF and W39BQ's carriage rights are unpersuasive. MPBC first asserts that WCBB's programming is not duplicative of WMEA's because the former

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] MPBC requests carriage of W39BQ on A-R's systems serving Auburn, Sabattus, the Lisbons, Oxford, and Mechanics Falls. MPBC requests carriage of W30BF on A-R's systems serving Bar Harbor, Bass Harbor, Bernard, Bucksport, Ellsworth, Manset, Southwest Harbor, Tremont, Verona, Bangor, Bradley, Brewer, Corrina, Dexter, Dover-Foxcroft, East Holden, Eddington, Hampden, Holden, Lincoln, Indian Island, Milford, Newport, Old Town, Orono, Orrington, Penobscot Plantation, Stillwater, Veazie, Winterport, Belfast, Searsport, and Winterport.

[3] On November 22, 1994, Cablevision filed separate motions for extension of time to respond to MPBC's petition for declaratory ruling. On November 30, 1994, MPBC filed its oppositions to A-R's motion for extension of time. We do not address the merits of the oppositions since we decide in favor of MPBC and order carriage of W39BQ and W30BF on Cablevision's cable systems.

[4] According to petitioner, WMEA-TV is licensed to MPBC and is eligible to receive a CSG from the Corporation for Public Broadcasting under Section 396(k)(6)(B) of the Communications Act of 1934 as amended.

[5] Cablevision estimates that it would incur losses of $36,700 in the first year, and $28,000 each year thereafter if it were required to carry W30BF. Additionally, Cablevision estimates that mandatory carriage of W39BQ would cause losses of $100,000 in the first year and $92,000 each additional year.

[6] *See* para. 8, *infra*.

caters to a wide, prime-time audience while the latter broadcasts programming to targeted and dedicated audiences and "provides a more educational and instructional focus."[7] As for Cablevision's argument that carriage of the Station's would negatively affect its business, MPBC asserts that the operator's expenses are "speculative and conjectural" since Cablevision fails to provide any evidence to document its figures. MPBC also argues that even if Cablevision's expenses were substantiated, the 1992 Cable Act does not take into account a cable operator's costs in determining the existence of mandatory carriage rights. Finally, MPBC argues that Cablevision's constitutional argument and request for a stay are without merit because the 1992 Cable Act's must carry provisions and the Commission's must carry rules remain in effect. MPBC also asserts that Cablevision acknowledges that the Commission cannot declare the must carry provisions unconstitutional. MPBC closes its replies by arguing that the public interest would be "substantially harmed" by delay of the Stations' carriage because Cablevision's service areas are deprived access to "unique and valuable noncommercial programming."

## DISCUSSION

5. We uphold the Stations' complaints against Cablevision. Initially, it is important to note that noncommercial translator stations, such as W39BQ and W30BF, have signal carriage rights.[8] Congress determined that translators should be carried because they are particularly important to state public television networks, like MPBC, in extending television signals to rural areas that are located far from the principal communities of the main station.[9] Based on the facts presented by MPBC, we find that W39BQ and W30BF are qualified noncommercial educational translator stations, meet the goals of Congress, and are entitled to carriage on Cablevision's systems.

6. We also agree with the Stations that their programming schedule is not substantially duplicative of WCBB, the other noncommercial station carried on Cablevision's systems. Our rules require cable systems with more than 36 usable activated channels to carry the signals of at least three qualified local NCE educational stations.[10] However, a cable system with more than 36 channels shall not be required to carry stations whose programming substantially duplicates the programming of another qualified local NCE station.[11] A station is deemed to substantially duplicate the programming of another station if it broadcasts the same programming, simultaneous, or non-simultaneous, for more than 50 percent of prime time, as defined in section 76.5(n) of our rules, and more than 50 percent outside of prime time over a three month period.[12] The stations have demonstrated through the submission of detailed program logs that their programming does not substantially duplicate the programming provided by WCCB. As such, the operator cannot rightfully deny the stations' carriage requests on this basis.

7. With respect to A-R Cable Services' argument that it be excused from compliance with the applicable provisions of the law because of the expense of compliance, we note that the obligations in question are statutory requirements and that A-R Cable Services has cited no authority for the Commission to waive the statute in the manner requested. No such authority is explicitly set forth in sections 614 and 615 of the 1992 Cable Act.[13]

8. Finally, we find that Cablevision's constitutional argument is without merit and deny the operator a stay of our signal carriage rules. The constitutionality of the must carry provisions of the 1992 Cable Act were challenged before the Supreme Court. In *Turner Broadcasting Systems, Inc. v. FCC*, a special three-judge panel of the District Court for the District of Columbia found the must carry provisions constitutional.[14] On appeal, the Supreme Court vacated the decision and remanded the case back to the three judge panel for further proceedings.[15] However, the Court did not stay the statute's must carry provisions or our rules while the case is on remand. Thus, while the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules.[16] We believe it would run contrary to the public interest to grant a stay and deny the stations the right to enforce their valid signal carriage rights in this instance.

9. Accordingly, the petitions filed on October 6, 1994, by Maine Public Broadcasting Corporation, ARE GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. A-R Cable Services IS ORDERED to commence carriage of W39BQ and W30BF on its cable systems within forty-five (45) days from the release date of this *Order*.

10. This action is taken pursuant to authority delegated by section 0.321 of the Commission's Rules.

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[7] MPBC includes as exhibits WCBB's and WMEA's daily programming line-up for a typical week to show that the two station's are not substantially similar.

[8] 47 U.S.C §535(l)(1); 47 C.F.R. §76.55(a)(3)(1). The only conditions which attach are that the translator must operate with five watts of power or higher and that it serves the franchise area. *Id.* We recently held that, for purposes of a translator serving the cable system's franchise area, the coverage area of such translator shall be its predicted protected contour as specified in section 74.707 of the Commission's rules. *See Memorandum Report and Order* in MM Docket No. 92-259, (Broadcast Signal Carriage Issues), FCC 94-251 (released November 4, 1994) at ¶ 4.

[9] *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 104 (1992) (Including translators in the definition of qualified noncommercial educational stations ensures carriage by cable systems in remote areas not served by the primary public television licensee.)

[10] 47 C.F.R. §76.56(a)(1)(iii).

[11] *Id.*

[12] *Id.* at note.

[13] The 1992 Cable Act did provide the Commission with the authority to waive the *channel positioning* provisions under extenuating circumstances. *See Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 at para. 91 (1993)("Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station.") Compare *Johnson v. Robinson*, 415 U.S. 361, 368 (1974).

[14] *See Turner Broadcasting Systems, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993).

[15] *See Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

[16] *See Memorandum Report and Order*, FCC 94-251 at ¶ 2.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MOBILE MARINE RADIO, INC., File Nos.
Complainant,

v.

IDB COMMUNICATIONS GROUP, INC., and E-94-25

KFS WORLD COMMUNICATIONS, E-94-26
Defendants.

**ORDER**

**Adopted: March 1, 1995; Released: March 8, 1995**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 9, 1993, Mobile Marine Radio, Inc. (MMR) filed the above-captioned complaints against IDB Communications Group, Inc. (IDB), and KFS World Communications (KFS), alleging violations of Sections 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 202. On February 8, 1995, MMR filed a request to withdraw its complaints, stating that certain actions had been taken by IDB that make it no longer necessary to seek remedial action through the Commission's complaint process.

2. We are satisfied that granting MMR's request to withdraw its complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that MMR's request to withdraw the above-captioned complaints IS GRANTED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

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|---|---|
| Montgomery Cablevision, L.P. dba Cable TV Montgomery | CSR-3895-A |
| For Modification of Television Broadcast Station WVVI's ADI | |
| Complaint of WTKK TV, Inc. against Montgomery Cablevision, L.P. dba Cable TV Montgomery | CSR-4144-M |
| Request for Carriage | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 28, 1995** **Released: March 9, 1995**

By the Cable Services Bureau:

## I. INTRODUCTION

1. Montgomery Cablevision, L.P. dba Cable TV Montgomery ["Cable Montgomery"], operator of a cable television system serving twenty-nine communities in Montgomery County, Maryland,[1] has filed the captioned petition for special relief (CSR-3895-A) seeking to delete these communities from the "area of dominant influence" of Television Broadcast Station WVVI (Ind., Channel 66), Manassas, Virginia, which is in the Washington, D.C. ADI. Cable Montgomery's petition is opposed by WTKK TV, Inc. ["WVVI"], licensee of Television Broadcast Station WVVI, and Cable Montgomery has replied.

2. Also pending is a complaint filed by WVVI against Cable Montgomery for failure to carry the signals of WVVI (CSR-4144-M). Cable Montgomery has opposed this petition, and WVVI has replied and has moved to consolidate its complaint and Cable Montgomery's petition. Because it is administratively efficient to do so, we will consolidate the two proceedings.

## II. BACKGROUND

3. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") added a new Section 614 to the Communications Act.[2] Pursuant that section and implementing rules adopted by the Commission in its *Report and Order, MM Docket* 92-259,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

4. The Commission adopted a *Report and Order* to implement mandatory broadcast signal carriage ("must-carry") provisions of the 1992 Cable Act.[6] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[7] On June 17, 1993, local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[8] Those broadcast stations that elected must-carry status were required to notify the cable system of their preferred channel position at that time.[9]

5. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) of the 1992 Cable Act provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

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[1] These communities are: Barnesville, Bethesda, Boyds, Brookeville, Burtonsville, Cabin John, Chevy Chase (4 portions), Chevy Chase Village, Derwood, Gaithersburg, Garrett Park, Germantown, Glen Echo, Kensington, Laytonsville, Olney, Poolesville, Potomac, Rockville, Silver Spring, Somerset, Takoma Park, Washington Grove, West Bethesda, Wheaton, and unincorporated portions of Montgomery County, Maryland.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *MM Docket* 92-259 , 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to a separate ADI of its own, even though stations from another market receive a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] *MM Docket* 92-259, 8 FCC Rcd 2965 (1993). *See also, MM Docket* 92-259, 8 FCC Rcd 4142 (1993).

[7] 47 C.F.R. § 76.56(a) (b). *But see Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

[8] 47 C.F.R. § 76.64(f) (1).

[9] 47 C.F.R. § 76.57(d).

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[10]

6. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
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> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[11]

7. The Commission provided guidance in its *Report and Order, MM Docket* 92-259, *supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up *e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

*Id.* at 1977 (emphasis in original).

8. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[12] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[13]

9. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[14] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights or simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

## III. ARGUMENTS OF THE PARTIES

10. *Cable Montgomery Petition for ADI Modification.* In support of its petition, Cable Montgomery argues that WVVI does not serve the communities in question, nor do they form part of the station's economic market. Cable

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[10] 47 U.S.C. §534(h) (1) (C) (ii).
[11] H.R. Rep. 102-628, 102d Cong., 2nd Sess. 97 (1992).
[12] *MM Docket* 92-259, 8 FCC Rcd at 2977, n.139.
[13] 47 C.F.R. §76.59.
[14] *MM Docket* 92-259, 8 FCC Rcd at 2981.

Montgomery states that it does not carry WVVI, nor has Cable Montgomery ever done so, "except possibly for a brief period in 1987 immediately following the purchase of the system . . . ." Cable Montgomery contends that while WVVI's *predicted* Grade B contour may cover Montgomery County, the station's actual signal quality at Cable Montgomery's headend is inadequate.[15] Cable Montgomery states that WVVI, as a Virginia licensee, does not serve the interests of Maryland residents, and that the station's program logs, which Cable Montgomery submits for the period March 7-June 5, 1993, demonstrate this by not showing any programming targeted to the communities served by Cable Montgomery. Indeed, notes Cable Montgomery, WVVI only carries one half hour of generic news programming daily. In contrast, argues Cable Montgomery, the other commercial stations licensed to the Washington ADI provide far more daily news coverage and local programming. Finally, Cable Montgomery submits 1991 and 1992 Arbitron data from both cable and noncable homes which fail to show any viewing for WVVI in Montgomery County, indicating that the station falls below the minimum 0.5% share of viewership for inclusion in the Arbitron reports.

11. In opposition to Cable Montgomery, WVVI contends that ADI market modification requests must be community-specific, yet Cable Montgomery seeks to delete an entire county from the Washington ADI. WVVI asserts that it has historically been carried in Montgomery County, and cites statements of account filed with the United States Copyright Office to demonstrate its carriage in Montgomery County communities from 1982 through late 1986 or early 1987, as well as carriage in neighboring Prince Georges County from 1985 through 1991.[16] WVVI notes that its predicted Grade B contour encompasses Montgomery County in its entirety, and that the station's transmitter is only about 22.5 miles from Cable Montgomery's headend. Moreover, WVVI asserts, Montgomery County is connected to Virginia by bridges across the Potomac River, and "Montgomery County is third in terms of dollars contributed for station support, after Fairfax and Prince William Counties, Virginia, and ahead of all others, including Washington D.C. and Arlington County, Virginia." WVVI states that its daily news program, "Capital Network News," "is oriented toward events of interest in the metropolitan area." Given that WVVI has not been carried in Montgomery County since the late 1980s, argues the station, audience ratings surveys "are not a fair test, even in non-cable homes."

12. In reply, Cable Montgomery notes that WVVI concedes that it has not been carried since at least 1988 in Montgomery County, nor, states Cable Montgomery, has there been any subscriber demand for the station's carriage, as evidenced by a subscriber survey submitted by Cable Montgomery. Cable Montgomery argues that WVVI's claim of strong donor support from Montgomery County is unsubstantiated, and may well merely reflect the county's high income levels, or donations from a few wealthy individuals. Cable Montgomery states, based on its own submitted survey of WVVI's "Capital Network News," that the stories covered are taken from syndicated stories of national interest, with no specific connection to communities in Montgomery County. In contrast, in addition to the other Washington ADI licensees, Cable Montgomery notes that it carries both News Channel 8, a regional news channel, and Montgomery Community Television (channel 21), a local origination channel, both of which daily carry programming specifically targeted to the communities in question. Viewership data for both cable and noncable homes is a statutory factor to consider, contends Cable Montgomery, whether or not WVVI is carried by area systems.

13. *WVVI Carriage Complaint.* In support of its complaint, WVVI states that, as a full power commercial television broadcast station licensed to Manassas, Virginia, it is entitled to carriage on Cable Montgomery's system, which serves communities located within WVVI's Washington ADI. WVVI notes that on June 2, 1993, the date on which the must carry rules became effective, Cable Montgomery filed its petition to modify WVVI's ADI. Although Cable Montgomery submitted engineering data with its petition to demonstrate that in fact WVVI's signal is substandard and therefore need not be carried, WVVI argues that Cable Montgomery's submitted data do not meet Commission requirements, nor does the filing of an ADI modification petition stay Cable Montgomery's obligation to carry WVVI. In addition, WVVI submits its own engineering data, which, the station claims, demonstrates the adequacy of its signal, and offers to provide to Cable Montgomery "any necessary receiving antenna and amplification equipment to enable the system to receive a -45dBm signal strength . . . ."

14. In opposition to WVVI, Cable Montgomery asserts that WVVI never notified the system in writing of its failure to comply with the rules prior to filing a complaint, as required by §76.61(a)(1) of the Rules. Cable Montgomery also maintains that because the system notified WVVI on April 27, 1993 that the station's signal was substandard and that the station would be considered distant for copyright purposes, this constitutes the system's requisite notice to the station pursuant to §76.61(a)(2) of the Rules. Accordingly, claims Cable Montgomery, WVVI's complaint was due by June 28, 1993, and is untimely. Cable Montgomery submits additional engineering data which, the system contends, demonstrates that WVVI's signal is still substandard, with ghosting problems as well. Cable Montgomery also criticizes WVVI's submitted data for not following the procedures mandated by the Commission in *Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable.*[17] In addition, Cable Montgomery contends that carriage of WVVI would entail increased copyright liability for the system, and it is not certain that the station new owners will be willing to provide the copyright indemnification originally promised prior to the transfer of control of the station. Moreover, notes Cable Montgomery, the

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[15] Cable Montgomery claims that, given WVVI's poor signal quality, the station fails to qualify for mandatory carriage rights pursuant to 47 U.S.C. §534(h)(1)(B)(iii) and 47 C.F.R. §76.55(c)(3). WVVI submits a study based upon which the station contends that its signal strength meets the necessary standard. Cable Montgomery also notes that, as approximately half of its franchise area lies beyond WVVI's 35-mile specified zone, the station is a "partially distant" signal for copyright purposes, whose carriage would increase Cable Montgomery's copyright liability.

[16] WVVI also offers to indemnify Cablevision for any additional copyright liability resulting from its carriage.

[17] 8 FCC Rcd 4953 (1993)

Commission has stated that, "[d]uring the pendency of a petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage."[18] Accordingly, asserts Cable Montgomery, it should not be required to add WVVI's signal pending the outcome of the system's ADI modification petition.

15. In reply, WVVI argues that it had no carriage rights to assert prior to June 2, 1993, when the must carry rules became effective, and did not elect must-carry status until June 17, 1993, and so informed Cable Montgomery. WVVI states that it never received any response from Cable Montgomery; that the station's opposition to Cable Montgomery's ADI modification petition, filed August 5, 1993, "placed [Cable Montgomery] on notice that it was not meeting its carriage obligations"; and that Cable Montgomery's reply to this opposition, filed August 16, 1993, made clear that the system would not carry WVVI. Accordingly, argues WVVI, its complaint, filed within 60 days of Cable Montgomery's August 16, 1993 filing, is timely pursuant to §76.7(c)(4)(iii)(A) of the Rules. WVVI asserts that its signal strength is indeed adequate, now that defective klystrons have been replaced and antenna damage has been repaired, and criticizes Cable Montgomery's testing procedures, citing *Complaint of Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.*,[19] and *Complaint of Rural California Broadcasting Corporation against DR Partners d/b/a Donrey Cablevision*.[20]

## IV. ANALYSIS AND DECISION

16. Because Cable Montgomery has not pointed to particularized and persuasive evidence that the communities in question are not part of WVVI's market, based on the four statutory or any other relevant factors, its petition must be denied. The use of ADI market areas, according to the legislative history of the 1992 Cable Act, is intended "to ensure that television stations be carried in the areas which they service and which form their economic market."[21] Changes may be sought and granted by the Commission "to better effectuate the purposes" of the mandatory carriage requirements.[22] The ADI market change process incorporated into the Communications Act, however, is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area involved is warranted.

17. Given the general structure of the market, it appears at the outset that WVVI is logically part of this ADI as are the cable communities in question. The 29 communities here in question are all located in Montgomery County, Maryland, which is part of the Washington, D.C. ADI. This ADI encompasses 30 counties and the District of Columbia, stretching some 160 miles from north to south and some 120 miles from east to west. At the core of the market is Washington, D.C. and the immediately surrounding counties, including Montgomery County, Maryland where the systems are located and Fairfax, Virginia where the station is located. WVVI is licensed to Manassas, Virginia to the west of Washington. Its transmitter is 22.5 miles from Cable Montgomery's principal headend and only 12 miles from the edge of Montgomery County. The specific communities in question are from 16 miles (Glen Echo) to approximately 30 miles (Burtonsville) from the WVVI transmitter. Virtually all of Montgomery County, where the communities in question are located, is within the Grade A contour of WVVI. These facts all suggest that the communities in question logically form part of the "economic market" of station WVVI and that it would not effectuate the purposes of the statute to exclude rather than include these communities from WVVI's market area.

18. Consideration of the statutory factors set forth above (para. 3) does not provide a persuasive case for altering this conclusion nor do we find that the arguments presented distinguish these cable communities from the rest of the market. With respect to the question of historical carriage patterns, WVVI -- and the other stations licensed in the same area -- have a history of carriage for some time prior to 1988 on the cable systems in question. Although much of this carriage took place prior to the time that the Commission's former mandatory signal carriage rules were ruled unconstitutional by the courts,[23] and when freed of the former rules' restrictions the system dropped the station, this is precisely the situation the 1992 Cable Act was designed to remedy.[24] We also note that Cable Montgomery carries virtually every other commercial Washington ADI licensee.

19. While Cable Montgomery contends that there is no subscriber demand for WVVI's carriage, we have previously recognized that stations such as WVVI, once referred to as "specialty" stations,[25] are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[26] We continue to believe, as we did then, that the fact that such stations attract limited audiences must be taken into account in determining the equities concerning such stations' rights to cable carriage. With regard to the question of WVVI's service to the communities in question, we have said that this may be demonstrated by the presence of a predicted Grade B contour, or by proximity to the community or communities in question,[27] which is clearly the case in the present circumstances. We also believe that WVVI has sufficiently demonstrated that its local service is designed to serve the needs and interests of the communities in question,[28] and we note Montgomery County's role as a significant donorship source for WVVI.

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[18] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[19] 8 FCC Rcd 6319 (1993)

[20] 8 FCC Rcd 8234 (1993)

[21] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[22] 47 U.S.C. 534(h)

[23] *See Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir. 1988), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[24] *See Act III Broadcasting of Nashville, Inc.*, 8 FCC Rcd 8544, 8546 (1993).

[25] According to an affidavit submitted on behalf of the station, it is a speciality station "in that it broadcast religious programming during at least one-third of the average broadcast week and one-third total weekly prime time hours during the last calendar year."

[26] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[27] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[28] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but

20. The portion of the 1992 Cable Act allowing for modification of ADIs "is intended to permit the modification of a station's ADI to reflect its individual situation."[29] In the present case, Cable Montgomery has not sufficiently demonstrated that the communities in question are not part of WVVI's ADI.

21. We turn next to WVVI's complaint against Cable Montgomery. Initially it appears that the complaint is timely filed. WVVI had no carriage rights until June 2, 1993, the effective date of the must carry rules. Subsequent to that date, it requested carriage on Cable Montgomery's system. WVVI's pleading of August 5, 1993, in CSR-3895-A notified Cable Montgomery in writing of WVVI's belief that the system was not meeting its carriage obligations, to which the system responded on August 16, 1993. WVVI timely filed its complaint on October 15, 1993, sixty days following Cable Montgomery's response.

22. It further appears that WVVI is entitled to carriage. Stations' signal carriage rights and cable systems' signal carriage obligations were established by the 1992 Cable Act. Carriage of the requisite number of local commercial full power television broadcast stations is mandatory.[30] The only exemptions from this requirement are for stations whose signal strength is inadequate, or the carriage of which would increase the system's copyright liability and the station does not agree to indemnify the system for such increased liability. The engineering data submitted by both parties demonstrates that, with the equipment provided Cable Montgomery by WVVI (an antenna cut to frequency to receive channel 66 and a preamplifier), a signal of sufficient strength from WVVI is receivable at Cable Montgomery's principal headend. That some minor ghosting problems may exist is a situation that must in the first instance be worked out cooperatively between the parties. With regard to Cable Montgomery's concern of increased copyright liability stemming from carriage of WVVI, we note that WVVI has agreed to indemnify Cable Montgomery for any such liability. Accordingly, Cable Montgomery's copyright liability concerns do not excuse it from carrying WVVI's signal.[31]

## V. ORDER

23. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the petition for special relief (CSR-3895-A) filed June 2, 1993 by Montgomery Cablevision, L.P. dba Cable TV Montgomery IS DENIED.

24. IT IS FURTHER ORDERED, That the petition (CSR-4144-M) filed October 15, 1993 by WTKK TV, Inc. IS GRANTED.

25. IT IS FURTHER ORDERED, That Montgomery Cablevision, L.P. dba Cable TV Montgomery SHALL COMMENCE CARRIAGE of the signal of WVVI forty-five (45) days from the release date of this *Order* on Montgomery Cablevision, L.P.'s system serving the communities listed in note 1, *supra*, providing that WVVI has provided Montgomery Cablevision, L.P. with the necessary preamplifier and antenna for proper reception of WVVI's signal, or forty-five (45) days from the date that WVVI provides such equipment to Montgomery Cablevision, L.P.

26. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue. *See Act III Broadcasting of Nashville, Inc., supra.*

[29] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[30] 47 U.S.C. §534(a).

[31] *See MM Docket 92-259*, 8 FCC Rcd at 2990.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Group W Television, Inc. CSR-3925-A
San Francisco, California

For Modification of the San
Francisco, California ADI

and

In re:

Complaint Against CSR-4146-M
Multivision Cable TV Corp.

Cable Television System
serving Fairfield, CA

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 1, 1995** **Released: March 9, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. Group W Television, Inc., licensee of Television Broadcast Station KPIX (CBS, Ch. 5), San Francisco, California, filed the above-captioned petition for special relief (CSR-3925-A) seeking to modify the San Francisco, California ADI on June 8, 1993. Group W seeks to include the communities of Fairfield, Suisun City and the surrounding portions of Solano County, California (hereinafter "Fairfield") in its ADI for purposes of the cable television mandatory broadcast signal carriage rules. KPIX's petition is opposed by three Sacramento-Stockton market stations: Great Western Broadcasting Corporation, licensee of Television Broadcast Station KXTV (CBS, Ch. 10), Sacramento; Kelly Broadcasting Company, licensee of Station KCRA-TV (NBC, Ch. 3), Sacramento; and KOVR TV, Inc., licensee of Television Broadcast Station KOVR (ABC, Ch. 13), Stockton. In addition, Multivision Cable TV Corp. ("Multivision"), operator of a cable system serving Fairfield, filed comments and a request for clarification and/or expedition on KPIX's petition, and Family Stations, Inc., licensee of Station KFTL-TV (home shopping, Ch. 64), San Leandro, California, located in the Sacramento ADI, filed comments on Multivision's request for clarification. KPIX filed no response to any of the above replies to its petition.

2. In a separate but related case (CSR-4146-M), on October 27, 1993, Ponce Nicasio Broadcasting, licensee of broadcast station KCMY-TV, (home shopping, Ch. 29), Sacramento-Stockton, California, filed a complaint against Multivision Cable TV Corp. (Multivision) for the latter's failure to comply with the Commission's must-carry rules and the 1992 Cable Act.[1] KCMY argues that the Commission's rules do not prevent Multivision from adding any signal or discontinuing carriage of any single other than KPIX. In its opposition to KCMY's complaint, Multivision contends that the Commission's rules require that it make no changes to its channel line-up until resolution of KPIX's ADI petition.[2]

3. In this *Memorandum Order and Opinion* we address both the KPIX Area of Dominant Influence (ADI) petition and KCMY's mandatory broadcast signal carriage complaint together in this proceeding because they present factually related issues which would best be resolved simultaneously.

## II. BACKGROUND

4. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") became law.[3] Pursuant to § 4 of that Act and implementing rules adopted by the Commission in its *Report and Order, MM Docket* 92-259,[4] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

5. The Commission adopted a *Report and Order* to implement mandatory broadcast signal carriage ("must-carry") provisions of the 1992 Cable Act.[7] Pursuant to the rules

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[1] KCMY states that on July 26, 1993 it first notified Multivision of its desire to be carried on Multivision's Fairfield, California system pursuant to must-carry. Multivision denied this request twice, first on July 31, 1993 and again on September 1, 1993.

[2] In addition, Multivision contends that KCMY's compliant is procedurally defective because it was filed more than 60 days after Multivision's first refusal to carry and because KCMY failed to serve all interested parties.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *MM Docket* 92-259 , 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[6] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to a separate ADI of its own, even though stations from another market receive a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[7] *MM Docket* 92-259, 8 FCC Rcd 2965 (1993). *See also, MM Docket* 92-259, 8 FCC Rcd 4142 (1993).

adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[8] On June 17, 1993, local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[9] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[10]

6. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) of the 1992 Cable Act provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
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> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[11]

7. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
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> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[12]

8. The Commission provided guidance in its *Report and Order, MM Docket* 92-259, *supra*, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes. *Id.* at 1977 (emphasis in original).

9. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[13] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[14]

10. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in

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[8] 47 C.F.R. § 76.56(a) (b). *But see Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

[9] 47 C.F.R. § 76.64(f) (1).

[10] 47 C.F.R. § 76.57(d).

[11] 47 U.S.C. §534(h) (1) (C) (ii).

[12] H.R. Rep. 102-628, 102d Cong., 2nd Sess. 97 (1992).

[13] *MM Docket* 92-259, 8 FCC Rcd at 2977, n.139.

[14] 47 C.F.R. §76.59.

copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[15] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights or simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

## III. ADI MODIFICATION AND MUST-CARRY ARGUMENTS

11. The communities here in question are all in Solano County East, California, which is located between San Francisco and Sacramento on the Sacramento-Stockton, California side of the boundary between the San Francisco and Sacramento-Stockton, ADIs.

12. In support of its petition, KPIX contends that Fairfield is located approximately equi-distant between San Francisco and Sacramento, and that not only do a substantial number of its residents commute to San Francisco to work, but also Fairfield's government and other public services are affiliated with San Francisco rather than Sacramento. While petitioner admits that the Sacramento stations are more easily viewable off-the-air due to an intervening mountain range, it argues that since Fairfield is located very close to the San Francisco ADI border, the San Francisco stations, including KPIX, receive a greater percentage of cable viewing in the area.[16] In addition, KPIX asserts that it has a higher percentage of viewing in Fairfield as a CBS affiliate than does KXTV, the comparable Sacramento CBS affiliate, and that KPIX has been carried on the Fairfield cable system since 1972. Moreover, KPIX maintains, it routinely covers news and local events for the Fairfield area,[17] and that it is the "single most important source" for such information.

13. In its opposition, KXTV, the Sacramento CBS affiliate, contends that the Nielsen figures cited by KPIX are misstated in that they do not specify dayparts for which the figures are achieved, nor do they indicate whether the dayparts include cable, noncable or total shares.[18] As evidence of these discrepancies, KXTV attached a letter from Nielsen testifying to the inaccuracies of the KPIX data.[19] Moreover, KXTV believes that KPIX's slightly higher viewership for network programming is due largely to KPIX's fortuitous channel position (channel 5) rather than to viewer loyalty. KXTV contends that during periods of non-network programming, it consistently commands a higher viewing share than KPIX,[20] while the Sacramento stations in general are watched by 50% of all households during the same period. KXTV challenges KPIX's claim to be the "single most important source of television news to the people of Fairfield-Suisun" by noting that petitioner does not offer any figures to support its position other than its claim to have aired 47 local news stories in 15 months. Of those 47 stories, KXTV points out, 19 concerned a single kidnapping, 8 a child molester, and the remaining 20 local crime. In comparison, KXTV states that during approximately the same period of time it aired 500 local news stories concerning the Solano County area, as well as numerous special interest stories. KXTV maintains that in fact two-thirds of all viewers in East Solano County rely on Sacramento stations for their weekday news. Finally, KXTV indicates that it has already been informed by Multivision, that due to channel capacity constraints, it will drop KXTV from its Fairfield system should the Commission grant KPIX's petition (because KPIX is located closer to Multivision's Fairfield headend than KXTV). KXTV argues, therefore, that a grant of KPIX's request would create a severe economic impact on KXTV that would be contrary to the Commission's instructions regarding modifying ADI Markets to "ensure that disruption to subscribers over the broadcast signals they receive is minimized."[21]

14. KOVR maintains in its opposition that KPIX fails to satisfy 3 out of 4 of the guidelines provided by the Commission. It argues that: a) petitioner covers little news and events of particular interest to Fairfield; b) KOVR and the other Sacramento stations provide significant local coverage; and c) local viewing patterns indicate that Fairfield residents rely on the Sacramento stations for their local news and other programming. KOVR argues that while it devotes considerable attention to the news and events of the Fairfield area in numerous news programs, KPIX has aired only a few, none of which focused specifically on the daily lives and opinions of Fairfield residents. KOVR states that all the Sacramento stations provide significantly stronger over-the-air signals than KPIX and the transmitters of all three Sacramento network stations are at least 10 miles closer to Fairfield than that of KPIX. KOVR points to the 1993 Nielsen County Coverage study which demonstrates that the Sacramento stations' viewership is clearly dominant in the area.[22] KOVR concludes that because of the

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[15] *MM Docket* 92-259, 8 FCC Rcd at 2981.

[16] KPIX states that according to the 1992 Nielsen County Coverage it and the other San Francisco stations have a combined 43% share of all day audience viewership in Fairfield as opposed to 34% for the Sacramento stations. (KPIX originally reported that the viewership figure for the Sacramento stations was 29.5%. This information was amended in a letter dated August 11, 1993.)

[17] KPIX states that it aired nearly 50 news stories concerning Fairfield in just 15 months.

[18] KXTV states that the only measurement where San Francisco stations combine to deliver a 43% share in the Fairfield area for 1992 is the M-F, 9:00 a.m. to 4:00 p.m. daypart for cable households. Further, it maintains that nowhere in the same survey do Sacramento stations achieve a 29.5% share of viewing. *See* Exhibit A to KXTV opposition.

[19] *See* Exhibit C to KXTV opposition.

[20] For instance, during the 4-6 p.m. daypart KXTV states it commands a 14% share of the non-network viewership as opposed to 4% for KPIX. *See* Exhibit A to KXTV opposition.

[21] *MM Docket* 92-259, 8 FCC Rcd 2965, 2976 (1993).

[22] KOVR states that the 1993 Nielsen study indicates a 45% share of total television household viewing viewership in both cable and noncable homes for the Sacramento stations as opposed to 38% share of total viewing for San Francisco stations, and that KPIX received an 8% share of total viewing. KOVR also states that during local news programs at 11:00 p.m. the

geographic continuity and flat terrain of the Fairfield and Sacramento areas, Fairfield residents share the same daily rural concerns and interests of the Sacramento residents.

15. KCRA-TV states in its opposition that it fully supports the arguments raised by KXTV. KCRA-TV submits an engineering study which indicates that: a) the center of Fairfield is closer to Sacramento than to San Francisco; b) the transmitter sites of the three Sacramento-Stockton network stations are 10.7 miles closer to Fairfield than the transmitter of KPIX; and c) the greater proximity of the Sacramento stations produces a predicted signal strength at Fairfield that exceeds that of the San Francisco stations by 8 to 10 dB.[23] In fact, KCRA-TV contends, the actual signal disparity is even greater due to the substantial terrain barrier between the San Francisco stations and Fairfield. As a result, the Sacramento-Stockton stations that lie east of the terrain barrier have a decided viewership advantage. Furthermore, KCRA-TV argues that the 1993 Nielsen County Coverage data for East Solano County indicates that on a full-week basis (7:00 a.m. to 1:00 a.m.) the Sacramento stations obtain an 85% viewing share in noncable homes as compared to a combined share of only 14% for the San Francisco stations.[24] KCRA-TV states that due to its extensive coverage of news and local events its viewing share on a full-day basis (both cable and noncable) is almost double that of KPIX and 50% higher than San Francisco's highest rated station, KGO-TV (ABC, Ch. 7). KCRA-TV concludes that grant of KPIX's request would not reflect the actual marketplace conditions, but merely change those conditions to KPIX's advantage.

16. In its comments, Multivision's argues that KPIX's petition should be denied because the petition requests more relief than it is entitled pursuant to §614(h)(1)(C) of the 1992 Cable Act. Specifically, Multivision contends that KPIX appears to request that the modification apply not only to its signal but to all the San Francisco stations as well.[25] Furthermore, in a later request for clarification and/or expedited action, Multivision states that KPIX's petition has precipitated a number of difficult and conflicting choices for the system, and it has been severely constrained in its ability to structure its channel line-up for the best interests of its subscribers. It contends that since the filing of the modification request it has been precluded by the "status quo" provisions of the 1992 Cable Act from dropping any of its currently-carried San Francisco stations until such time as there is a resolution of KPIX's petition. As a result of the combined carriage of both San Francisco and Sacramento stations, Multivision argues that it is currently devoting the required one-third of its channel capacity to must-carry channels. It therefore requests that the Commission either rule on the existing petition or clarify that it is not required to add any future must-carry channels until such time as the current impasse is resolved.

17. In its comments on Multivision's request for clarification, KFTL-TV argues that Multivision is mistaken in its belief that it must continue to carry all of the San Francisco stations until KPIX's petition is resolved. It requests that the Commission issue a clear statement that ADI petitions must be filed by one individual station and that the operator must maintain the status-quo only with respect to that station until action by the Commission. This is particularly important, KFTL-TV asserts, given that it is a station with must-carry rights in the Sacramento ADI whose right to be carried on Multivision's system is currently being denied due to the operator's misinterpretation of the Commission's Rules.

18. Finally, KCMY's complaint (CSR-4146-M) echoes KFTL's arguments stating that an operator's obligation to maintain its channel line-up status quo does not preclude the addition of must-carry eligible stations during the pendency of an ADI petition.

## IV. DISCUSSION OF ADI ISSUES

19. As a preliminary matter, it is necessary to address Multivision's claim that KPIX is improperly requesting a market modification for stations other than itself. Section 614(h)(1)(C)(i) of the 1992 Cable Act states that the "Commission may, with respect to *a particular television broadcast station,* include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section (emphasis supplied)." In addition, the Commission has stated that ADI modifications would be treated as specific to particular stations rather than applicable to all stations in the market.[26] Thus, we agree with Multivision that KPIX's petition can only properly be on its own behalf. The KPIX petition, however, seeks relief "to ensure that cable television viewers in the Fairfield-Suisun market continue to receives those San Francisco signals they have been accustomed to viewing" and presents evidence designed to demonstrate that "Fairfield-Suisun should be part of San Francisco's must carry market." Thus, as a matter of general process, it would be difficult to grant KPIX the relief requested. However, even if we were to construe this request as applicable to KPIX and its circumstances alone rather than those of other San Francisco broadcast stations, a case has not been made out to grant the market change requested.

20. As stated in the *Report and Order* implementing the mandatory carriage requirements,[27] the 1992 Cable Act permits the Commission to add or subtract communities from a television stations market to better reflect market place conditions or to promote the goal of localism underlying the signal carriage provisions. As guidance, the Commission listed the four factors set out above, but also stated that the types of evidence considered should not be

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Sacramento stations receive a 54% share compared to the San Francisco stations' 32% share, and KPIX's share of 6% during this time period.

[23] Attachment A to KCRA opposition, Engineering Statement: Television Service in Fairfield, California from Network Stations in Sacramento/Stockton and San Francisco, by Jules Cohen & Associates, P.C. (Executed Aug. 11, 1993).

[24] KCRA-TV claims that for local news programs the 63% of the viewers in Solano County East rely on the Sacramento network affiliates, as opposed to 37% who depend on the San Francisco stations.

[25] In addition to the arguments raised above, Multivision asserts that KPIX's petition should be dismissed because it failed to serve all interested parties. KPIX rectified its omission by submitting an amended service list.

[26] *See also MM Docket* 92-259, 8 FCC Rcd at 2977 n.139.

[27] *Id.* at 2976.

restricted because each case will be unique.[28] The Sacramento-Stockton ADI was created by Arbitron as a separate and distinct ADI from San Francisco, with Solano County specifically divided into western and eastern portions, based in part on a significant terrain barrier dividing the two ADI's. Because of this barrier, in the Fairfield area Sacramento stations are more easily viewable off the air. As KPIX itself concedes "because of terrain factors, KPIX is very difficult to view off the air." In terms of total over-the-air audience as reflected in 1993-94 Arbitron data, Sacramento-Stockton rather than San Francisco stations are preferred by viewers in the area by a wide margin; an 85% share for Sacramento-Stockton market stations versus only 13% for San Francisco stations. KXTV, the Sacramento CBS affiliate that competes most directly with KPIX has, according to the 1993-94 Arbitron data, four times the over-the-air audience as KPIX.

21. The other information submitted does not suggest that a preferable allocation of the area in question between the markets is available or that to grant the request would "better effectuate the purposes" of the applicable statutory provisions. With regard to the first of the statutory guidelines, whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within the community in question, KPIX has demonstrated a history of carriage on Multivision's Fairfield system. However, it appears that the system carries and has historically carried signals from both the San Francisco and the Sacramento-Stockton television market. Thus, this fact alone is of marginal assistance in resolving the issue of whether the Fairfield communities should be moved into KPIX's market.

22. Regarding the second guideline, KPIX has shown that it provides coverage of and service to the relevant communities. In fact, in an effort to show that KXTV provides a stronger signal in the Fairfield area, and that KPIX is not widely viewable off-air, KXTV submitted an engineering study which shows the availability of a measured Grade B signal level in the relevant areas. We note, however, that there appears to be little dispute that the Sacramento stations place an even higher signal level over the Fairfield area. Furthermore, KPIX has submitted evidence of numerous programs specific to the relevant communities. Again, however, the local service of KPIX's programming is of less weight when viewed in relation to that provided by the Sacramento stations. KXTV, KOVR and KCRA all submitted evidence showing that the frequency and subject matter of their programming reflects more extensive coverage of news and other local interests than that provided by KPIX.

23. KPIX has not fully addressed the third factor – whether other stations entitled to carriage provide news and other programming of concern or interest to the communities in question. However, as stated above, the stations opposing KPIX's petition filed substantial evidence which meets this guideline. We believe this criterion was primarily intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Because the opposing stations appear to better serve the Fairfield communities, this factor does not weigh in favor of the relief requested.

24. Similarly, regarding the fourth factor, although KPIX has submitted evidence of viewership in the relevant communities, a review of the 1992 Nielsen audience study submitted by KPIX indicates that these data are for the all day viewership share in cable homes only.[29] Such data is not directly responsive to the standards in the 1992 Cable Act and in the Commission's rules that seek evidence on audiences for both cable and noncable households.[30] Arbitron's 1993 data and the 1992 Nielsen data indicate that KPIX attains an average 8 share of total weekly viewing hours and an average 57 net weekly circulation share in Solano East County. However, what these statistics do not show is that the majority of KPIX's viewing share is attributed to cable households. For non-cable county viewing, KPIX attains an average of only 4 share of total weekly viewing hours and an average of only 17 net weekly circulation share.[31] By examining cable and noncable viewing separately, we see that without the benefit of cable carriage, KPIX would not be widely viewed in the Fairfield area. Accordingly, KPIX's all day viewing share does not support a showing of localism.

25. While KPIX has provided evidence attempting to show that it provides local service to the Fairfield area, the nature of the evidence submitted, combined with the existence of other market factors such as the substantial terrain barrier separating the two ADI's and the significant differences in over-the-air audience lead us to conclude that grant of KPIX-TV's petition is not in the public interest.

## V. DISCUSSION OF MUST CARRY ISSUE

26. Given our resolution of KPIX's ADI modification petition, the grounds set forth by Multivision in opposition to Ponce Nicasio's request for carriage of KCMY no longer exist. Accordingly, it is appropriate that Multivision comply with the must carry rules with respect to that station.

## VI. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED, pursuant to Section 614 of the Communications Act of 1934, as amended, (47 U.S.C. 534) and Section 76.59 of the Commission's Rules (47 C.F.R. Section 76.59), that the captioned petition for special relief filed June 2, 1993 by Group W Television IS DENIED.

28. IT IS FURTHER ORDERED, that the complaint filed on October 27, 1993 by Ponce Nicasio Broadcasting Company (KCMY) IS GRANTED.

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[28] *Id.* at 2977.

[29] According to the 1993 Nielsen County Coverage Study, the Sacramento stations had a 45% share of all day audience as opposed to 38% for the San Francisco stations. *See* Attachment C to KCRA opposition.

[30] These data may be presented for cable and noncable households separately or combined.

[31] We recognize that this data is county data rather than community specific, but in the absence of evidence that it is not representative of general viewing patterns in the subject areas we shall accept it as probative. Arbitron's *1993 County Coverage Surveys*, Standard/Fringe Volume.

29. In accordance with § 614(d)(3) (47 U.S.C. 534) of the Communications Act of 1934, as amended, and Multivision Cable TV Corporation IS ORDERED to commence carriage of Station KCMY-TV, forty-five (45) days from the release of this ORDER.

30. These actions are taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

| | |
|---|---|
| Complaint of Rural California Broadcasting Corp. against Western Cabled Systems | CSR-4269-M<br>CA-1373 |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 22, 1995** **Released: March 9, 1995**

By the Cable Services Bureau:

## I. INTRODUCTION

1. On June 6, 1994, the above petition on behalf of Rural California Broadcasting Corporation, licensee of Station KRCB-TV (Educ., Channel 22 ), Cotati, California, was filed with the Commission. An opposition to this petition was filed July 18, 1994, on behalf of Western Cabled Systems ("Western"), operator of cable television systems serving unincorporated San Mateo County, as well as the following communities: Richmond, Daly City, San Mateo, Belmont, Woodside, and Portola Valley, California. On August 5, 1994, KRCB-TV replied to this opposition.

## II. SUMMARY OF PLEADINGS

2. In its petition, KRCB-TV states that it is entitled to carriage on Channel 22 by the above systems, pursuant to Section 615(g)(4) of the Communications Act of 1934, as amended (47 U.S.C. 535), but that they have refused to do so, claiming by letter dated May 25, 1993, that the requested carriage might subject the systems to increased copyright payments, and that signal strength tests performed June 5, 1993, demonstrated that KRCB-TV lacked sufficient signal strength at the systems' designated principal headend at Richmond. According to KRCB-TV, however, Western's data from its June 5, 1993 signal strength tests is not sufficient, citing the Commission's prior decision in *Complaint of Rural California Broadcasting Corporation against DR Partners d/b/a Donrey Cablevision*, 8 FCC Rcd 8234 (1993).

3. In its opposition, Western claims that KRCB-TV never sent it an actual request for carriage. The station merely stated in a letter dated December 8, 1993, that it was "specifically exploring carriage" on Western's systems. With respect to its test results, Western cites the Commission's prior decision in *Complaint of Rural California Broadcasting Corporation against Americable International*, 9 FCC Rcd 2279 (1994), and notes that in three of the four tests it took, subsequent to the June 5, 1993 test, at its Richmond headend on June 29, 1994, and on July 14, 1994, KRCB-TV's signal strength measured less than -51 dBm; it only tested greater than -45 dBm at 7:00 a.m. on June 29, 1994.[1] Western, therefore, claims that it cannot add KRCB-TV, due to its poor signal strength at Richmond, which Western notes is the closest of all the communities to Cotati, KRCB-TV's community of license.

4. In response, KRCB-TV maintains that its intent was clear ever since it sent Western ten letters requesting information concerning its headend location. KRCB-TV also repeats its contention that the data collected by Western on June 5, 1993, was insufficient, pursuant to Commission precedent,[2] and it notes that one of the measurements taken on June 29, 1994, reached a level of -43.15 dBm, while another on July 14, 1994, tested -45 dBm, both of which KRCB-TV maintains are acceptable signal strength levels for an educational UHF station.

## III. DISCUSSION

5. According to Section 615(g)(4) of the Communications Act of 1934: ". . . a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." Since the cable operator is at the outset in a superior position to know whether or not a given station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices to measure the signal delivered to the headend.

6. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), did not set a standard either for VHF or for UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we will utilize the same standards as *prima facie* tests to initially determine, absent

[1] Altogether Western took eight measurements of KRCB-TV's signal strength, all under the supervision of its Chief Operating Officer, Larry Whitney. The four on June 29, 1994 revealed the following signal strengths: -43.15 dBm, at 7:00 a.m.; -51.25 dBm, at 11:00 a.m.; -52.25 dBm, at 2:30 p.m.; and -51.45 dBm, at 6:00 p.m. The other four tests on July 14, 1994, showed the following signal strengths: -45 dBm, at 7:30 a.m.; -51.25 dBm, at 10:30 a.m.; -51.95 dBm, at 2:45 p.m.; and -49.95 dBm, at 5:50 p.m.

[2] Specifically, KRCB-TV notes that the test was performed on June 6, 1993, after the May 3, 1993 deadline; that it did not include a sketch; nor did it specify the date, the time, or the prevailing weather conditions during the test; the height and the orientation of the antenna used was not given, nor was the age of the equipment utilized or its most recent calibration; and the measurements were not made over a 24-hour period, with none more than 4 hours apart.

other evidence, whether or not VHF or UHF noncommercial stations place adequate signal levels over a cable system's principal headend.

7. In this instance, Western determined that KRCB-TV's signal strength was below the requisite level for a UHF station. However, Western failed to follow generally acceptable engineering practices, because in cases where test results are less than -51 dBm for a UHF station, there must not only be at least four readings taken over a two-hour period, but readings must also be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results where the initial readings are between -51 dBm and -45 dBm, inclusive.[3] Review of the tests made by Western on June 29, 1994, and on July 14, 1994, *see* n.1, *supra*, reveal that they are insufficient to demonstrate, consistent with Commission requirements, that KRCB-TV's signal strength is generally below the level of -45 dBm required for UHF stations.[4]

## IV. ORDERING CLAUSES

8. In view of the foregoing, we find that Western has failed to adequately demonstrate KRCB-TV's poor signal quality at Western's designated headend.

9. Accordingly, the petition filed June 6, 1994, on behalf of the Rural California Broadcasting Corporation, licensee of Station KRCB-TV (Educ., Channel 22), Cotati, California, IS GRANTED, pursuant to Section 615(j)(3) of the Communications Act of 1934, as amended (47 U.S.C. 535), and Western Cabled Systems IS ORDERED to commence carriage of KRCB-TV on its cable television systems serving Daly City, Portola Valley, Belmont, Woodside, Richmond, and San Mateo, California, on Channel 22 forty-five (45) days from the release date of this Order unless Western submits the engineering data required herein to support its assertion of poor signal quality from KRCB-TV at Western's principal headend.

10. This action is taken by pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[3] At a minimum, signal strength surveys should include the following information, in addition to that noted above: (1) the specific make and model numbers of the equipment used; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether or not the antenna was properly oriented; (4) the weather conditions and time of day when the tests were done. For VHF stations, if the test results are less than -55 dBm, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.

[4] *See Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, 8 FCC Rcd 4953 (1993). Because of the possibility of anomalous test results not being representative of the general availability of the signal in question, good engineering practice generally requires that a series of measurements be taken. Given the "snap shot" nature of the two hour test we believe that all four measurements must be less than -51 dBm for UHF stations in order to establish the absence of a good quality signal and avoid the necessity for undertaking the 24 hour test sequence. If the 24 hour test continues to suggest anomalies rather than consistent signal levels, additional testing could be required.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| CASS VALLEY NORTH #76<br>Amenia, North Dakota | File No. BPLIF-920709DA |
| KINDRED SCHOOL DISTRICT #2<br>Walcott, North Dakota | File No. BPLIF-921016DO |
| LISBON PUBLIC SCHOOL SYSTEM<br>Fort Ransom,<br>North Dakota | File No. BPLIF-921204EF |
| MOORHEAD STATE UNIVERSITY<br>Barnesville, Minnesota | File No. BPLIF-930416EI |

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels B1-B4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995** **Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Cass Valley North #76 (Cass Valley), Kindred School District #2 (Kindred), Lisbon Public School System (Lisbon), and Moorhead State University (Moorhead), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4. The applicants propose to serve Amenia, Walcott, and Fort Ransom, North Dakota and Barnesville, Minnesota, respectively.

## BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). All of the applicants are qualified to be ITFS licensees. Cass Valley and Lisbon are accredited by the State of North Dakota and each proposes to serve the formal educational needs of students enrolled at schools within their jurisdictions. Kindred is accredited by the State of North Dakota Department of Public Instruction and is also proposing to serve students enrolled at schools within its jurisdiction. Finally, Moorhead is accredited by the Commission on Higher Institutions of Higher Education of the North Central Association of Colleges and Schools and will be serving its own enrolled students.

## MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

**Localism.** Each applicant is entitled to four points for being local. Cass Valley, Kindred, and Lisbon are school systems proposing to serve the formal educational needs of students enrolled at schools within their jurisdictions. Moorhead is an educational institution proposing to provide formal educational programming to its own enrolled students.

**Accreditation.** Each applicant is entitled to three points for accreditation. Cass Valley and Lisbon are accredited by the State of North Dakota. Kindred is accredited by the State of North Dakota Department of Public Instruction and Moorhead is accredited by the Commission on Higher Institutions of Higher Education of the North Central Association of Colleges and Schools.

**Four-Channel Limitation.** None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Cass Valley's grid and illustrative schedule propose an average of 22 hours of formal educational programming per channel perweek. Thus, Cass Valley is entitled to one programming merit point. The illustrative schedules and programming grids of Lisbon and Moorhead propose an average of 42 hours of formal educational programming per channel per week. Thus, Lisbon and Moorhead are each entitled to receive two programming merit points. In contrast, Kindred's illustrative schedule and programming grid propose an average of 24.375 hours of ITFS programming. The programming grid indicates that the programming will be formal educational. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Platte Valley School District RE-7*, 9 FCC Rcd 3164 (1994). Because of the inconsistency involving the types of programming proposed, Kindred is not entitled to any programming merit points.

**E- and F- Channel Group Relocation.** None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

**Total.** Cass Valley is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Kindred is entitled to four points for being local, three points for being accredited and two points for observing the four-channel limitation, for a total of nine points. Lisbon and Moorhead are each entitled to a total of eleven points: four points for being local; three points for being accredited; two points for observing the four-channel limitation; and two points for proposing at least 41 hours of formal educational programming per channel per week. Because the applications of Lisbon and Moorhead are mutually exclusive only with the application of Kindred and because they have the greatest number of points, Lisbon and Moorhead are the tentative selectees and the application of Kindred will be denied. In view of our action denying the application of Kindred, there is no longer any mutual exclusivity with respect to the application of Cass Valley. Accordingly, that application can also be granted.

## OTHER MATTERS

5. Cass Valley, Lisbon and Moorhead propose to lease their excess capacity for non- ITFS use, as permitted by 47 C.F.R. Section 74.931. Moorhead has submitted a copy of its lease with Family Entertainment Network Partnership, which accords in all respects with our requirements. Cass Valley and Lisbon have submitted a copy of their leases with Serve, Inc. Their leases, however, do not entirely conform to the Commission's requirements. Neither applicant's lease provides for the licensee's right to purchase the ITFS equipment at its fair market value in the event the lease is terminated as a result of some action on the part of the excess capacity lessee. We have consistently maintained that the licensee be permitted the opportunity to purchase the ITFS equipment necessary to maintain its operation in the event of such termination. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, this provision neither reflects on the applicants' basic or comparative qualifications, nor precludes a grant of an authorization. Nevertheless, the authorizations of Cass Valley and Lisbon will be conditioned upon conformity of their leases to Commission requirements. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472, 1473 (1987).

6. No petitions to deny or informal objections have been filed against the applications of Cass Valley, Lisbon and Moorhead, and we find these applicants fully qualified to be ITFS licensees. We also conclude that grant of their applications would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Kindred School District #2 (BPLIF-921016DO) IS DENIED, and the application of Moorhead State University (BPLIF-930416EI) IS GRANTED.

8. IT IS FURTHER ORDERED, That the applications of Cass Valley North #76 (BPLIF-920709DA) and Lisbon Public School System (BPLIF-921204EF) ARE GRANTED, subject to the condition that within 30 days of the release of this Order, Cass Valley and Lisbon submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, amended lease agreements conforming in the manner discussed herein.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

SOUTHEAST NEBRASKA CONSOLIDATED SCHOOLS
Peru, Nebraska — File No. BPLIF-920501DE

ADAMS PUBLIC SCHOOL DISTRICT 30
Tecumseh, Nebraska — File No. BPLIF-930416DT

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1-D4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995** **Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Southeast Nebraska Consolidated Schools (Southeast) and Adams Public School District 30 (Adams), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Peru and Tecumseh, Nebraska, respectively.

### BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Southeast and Adams are both accredited by the Nebraska Department of Education and propose to serve the formal educational needs of students enrolled in schools located within their respective jurisdictions.

### MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

**Localism.** Both applicants are entitled to four points because they are school districts that propose to serve the formal educational needs of students enrolled in schools located within their respective jurisdictions.

**Accreditation.** Both applicants are entitled to three points for being accredited by the Nebraska Department of Education.

**Four-Channel Limitation.** Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Southeast's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational and zero hours of other ITFS programming per channel per week. Thus, Southeast is entitled to one programming merit point. In contrast, Adams' illustrative schedule and programming grid propose an average of 42 hours of formal

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

educational programming per channel per week. Consequently, Adams is entitled to two programming merit points.

**E- and F- Channel Group Relocation.** Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

**Total.** Southeast is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Adams is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, the tentative selectee is Adams.

## OTHER MATTERS

5. No determination has been made that the tower heights of six of the receive sites proposed by Adams would not constitute a hazard to air navigation. Accordingly, a grant of a construction permit/license authorization to Adams will be appropriately conditioned. See *Bells Independent School District*, 9 FCC Rcd 1551, 1552 (1994).

6. Adams proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with U.S.A. Wireless, Inc., which conforms in all respects with our requirements.

7. No petitions to deny or informal objections have been filed against Adams' application, and we find Adams fully qualified to be an ITFS licensee. We also conclude that grant of Adams' application would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the application of Southeast Nebraska Consolidated Schools (BPLIF-920501DE) IS DENIED, and the application of Adams Public School District 30 (BPLIF-930416DT) IS GRANTED, subject to the following:

> This authorization is subject to the condition that construction of the receive towers at receive site locations R1, R2, R5, R7, R13 and R15 is prohibited until clearance is received from the Federal Aviation Administration, the Commission is so notified, and appropriate painting and lighting specifications are determined.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

SOUTHEAST COMMUNITY COLLEGE
Tecumseh, Nebraska — File No. BPLIF-930415DG

SYRACUSE-DUNBAR-AVOCA PUBLIC SCHOOLS
Peru, Nebraska — File No. BPLIF-920501DG

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1-A4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995** **Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Southeast Community College (College) and Syracuse-Dunbar-Avoca Public Schools (Syracuse), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of Tecumseh and Peru, Nebraska, respectively.

## BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. College is accredited by the North Central Association of Schools and Colleges and is applying to serve the formal educational needs of its own students. Syracuse is accredited by the Nebraska Department of Education and is applying to provide formal educational programming to students enrolled at schools located within its jurisdiction.

## MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose request would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

**Localism.** College is entitled to four points because it is an educational institution that proposes to serve the formal educational needs of its own enrolled students. Likewise, Syracuse is entitled to four points because it is a school system that proposes to provide formal educational programming to students enrolled at schools located within its jurisdiction. Accreditation. Both applicants are entitled to three points because they are accredited by the North Central Association of Schools and Colleges and the Nebraska Department of Education, respectively.

**Four-Channel Limitation.** Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." College's illustrative schedule and programming grid propose an average of 42 hours of ITFS programming per

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

channel per week, all of which is to be formal educational programming. Consequently, College is entitled to two programming merit points. In contrast, Syracuse's illustrative schedule and programming grid propose 24.375 hours of formal educational programming per channel per week. Syracuse is therefore entitled to only one programming merit point.

**E- and F- Channel Group Relocation.** Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

**Total:** College is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Syracuse is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Thus, the tentative selectee is College.

## OTHER MATTERS

5. College proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Wireless Entertainment Network, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against College's application, and we find College fully qualified to be an ITFS licensee. We also conclude that grant of College's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Syracuse-Dunbar-Avoca Public Schools (BPLIF-920501DG) IS DENIED, and the application of Southeast Community College (BPLIF-930415DG) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

| | |
|---|---|
| WARNER PUBLIC SCHOOLS<br>Warner, Oklahoma | File No. BPLIF-920713DE |
| STUART PUBLIC SCHOOLS<br>McAlester, Oklahoma | File No. BPLIF-920305DB |
| EAST CENTRAL UNIVERSITY<br>Henryetta, Oklahoma | File No. BPLIF-930219DV |

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels G1-G4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995; Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Warner Public Schools (Warner), Stuart Public Schools (Stuart) and East Central University (ECU), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the areas of Warner, McAlester and Henryetta, Oklahoma, respectively.

## BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All three applicants are qualified to be ITFS licensees. Warner and Stuart are school districts that are accredited by the Oklahoma State Department of Education and the State Board of Education, respectively, and that propose to serve students enrolled at schools located within their jurisdictions. ECU is accredited by the North Central Association of Schools and Colleges and is applying to serve its own enrolled students.

## MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

**Localism.** Stuart and Warner are entitled to four points because they are school districts proposing to serve the formal educational needs of students enrolled in schools located within their respective jurisdictions. ECU is also entitled to four points because it is proposing to provide formal educational programming to its own enrolled students.

**Accreditation.** All three applicants are entitled to three points for being accredited either by the Oklahoma State Department of Education, the State Board of Education or the North Central Association of Schools and Colleges.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

**Four-Channel Limitation.** None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *See Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Warner's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational and zero hours of other ITFS programming per channel per week. Thus, Warner is entitled to one programming merit point. In contrast, Stuart's illustrative schedule proposes an average of 13.125 hours of ITFS programming per channel per week of which 6.625 hours is formal educational programming. However, its grid proposes an average of 23 hours of ITFS programming per channel per week, 7 hours of which is formal educational programming. In neither case do the amounts of programming specified by Stuart in its schedule or grid reach the threshold amount at which merit points are awarded. Consequently, Stuart is entitled to no programming merit points. On the other hand, ECU's illustrative schedule proposes an average of 22.875 hours of ITFS programming per channel per week, with an average of 11.75 hours per channel per week being devoted to formal educational programming. However, its grid proposes an average of 22.85 hours of ITFS programming per channel per week, of which 12.75 hours is formal. Similarly, in neither case does ECU's schedule or grid establish the threshold amount at which merit points are awarded. Therefore, ECU too is entitled to no programming merit points.

**E- and F- Channel Group Relocation.** None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

**Total.** Warner is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Stuart and ECU are entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points apiece. Thus, the tentative selectee is Warner.

## OTHER MATTERS

5. No determination has been made that the tower height of two of the receive sites proposed by Warner would not constitute a hazard to air navigation. Accordingly, grant of a construction permit/license authorization to Warner will be appropriately conditioned. See *Bells Independent School District*, 9 FCC Rcd 1551, 1552 (1994).

6. Warner proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with RuralVision Central, Inc., which conforms in all respects with our requirements.

7. No petitions to deny or informal objections have been filed against Warner's application, and we find Warner fully qualified to be an ITFS licensee. We also conclude that grant of Warner's application would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the applications of Stuart Public Schools (BPLIF-920305DB) and East Central University (BPLIF-930219DV) ARE DENIED, and the application of Warner Public Schools (BPLIF-920713DE) IS GRANTED, subject to the following:

> This authorization is subject to the condition that construction of the receive towers at receive site locations R17 and R18 is prohibited until clearance is received from the Federal Aviation Administration, the Commission is so notified, and appropriate painting and lighting specifications are determined.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**March 6, 1995**

**Released: March 9, 1995**

Mr. Greg Casey
Senior Vice President
Oncor Communications, Inc.
6707 Democracy Boulevard
Bethesda, Maryland 20817

Dear Mr. Casey:

This is a letter of admonition issued to Oncor Communications, Inc. (Oncor) in connection with the informal complaint filed by Mr. Randal Collett of the Association of College and University Telecommunications Administrators (ACUTA) (File No. IC-94-15325). In his complaint, Mr. Collett states that Oncor is promoting a service whereby an individual dials the Oncor access code (10658), plus 0, and then a Canadian number to reach an information provider. According to the complainant, no operator asks for billing information, and the call is apparently billed to the originating telephone on the basis of Automatic Number Identification (ANI). Mr. Collett states that this situation has the potential to be financially disastrous to the ACUTA members, who allow students to use 10XXX0+ access to their long distance carriers.

The Enforcement Division's staff served ACUTA's letter on Oncor. Your company responded on November 16, 1994 and did not dispute the availability of the calling sequence that Mr. Collett described. Oncor states that a consumer who wishes to place an international call over Oncor's network would dial 10 "followed by Oncor's access code of 6580...." Oncor's response states that this access method "is designed for direct dialed calls by residential subscribers." The letter, however, does not address the concern raised by Mr. Collett regarding calls from aggregator locations, other than an offer by Oncor to block calls at the subscriber's request. For the reasons set forth below, we conclude that Oncor's procedure for handling 10XXX0+ calls is inconsistent with the Commission's rules and policies regarding operator services and toll fraud.

In CC Docket No. 91-35, the Commission required aggregators to selectively unblock 10XXX access codes so that consumers could use this dialing sequence to reach interexchange carriers. *See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991). Aggregators were allowed to block 10XXX dialing sequences that always result in billing to the originating telephone, such as 10XXX1+, but were required to unblock 10XXX calls that are delivered to a carrier's operator services. Traditionally, 10XXX0+ calls have resulted in interception by the carrier's operator to determine how the call should be billed, and to observe any billing restriction codes that are delivered with the call. The Commission subsequently delayed in part the 10XXX unblocking requirement to ensure that aggregators were not exposed to toll fraud associated with selectively unblocking 10XXX access. By using a non-industry standard for handling 10XXX0+ calls, however, Oncor has thwarted the Commission's efforts to unblock 10XXX access in a way that is readily understandable and fair to both consumers and aggregators.

The provision of 106580+ access without operator interception, with the cost of the call billed to the originating number, is an invitation to toll fraud from aggregator locations. As you know, the Commission has concluded that carriers have an obligation to prevent toll fraud. In cases where the carrier was in the best position to prevent fraud but failed to take reasonable steps to prevent the fraudulent calls, the Commission will not impose liability on the subscriber of the originating phone. *Cf. United Artists Payphone Corp. v. New York Tel. Co. and American Tel. & Tel. Co.*, 8 FCC Rcd 5563, 5566 n.44 (1993) (carriers must take appropriate action to prevent fraudulent calling). It is not sufficient for Oncor to offer to block 10XXX0+ calls from individual aggregator locations at the request of the aggregator. The obligation on Oncor in the first instance is to comply with the Commission's efforts to prevent toll fraud by taking reasonable preventive steps before the fraudulent calls are made. In this case, that obligation is not to bill 10XXX0+ calls using ANI. It is an unreasonable practice to require all aggregators to conform to Oncor's nonstandard access arrangement, with blocking of that access available only on request.

Accordingly, Oncor is directed to immediately stop allowing 10XXX0+ calls to be billed to the originating telephone, and, for such calls, to immediately implement operator intervention that will obtain billing information by means of a valid calling card. Please respond within five days of the date of this letter confirming Oncor's compliance with this requirement.

Sincerely,

Gregory A. Weiss
Acting Chief, Enforcement Division
Common Carrier Bureau

cc: Randal Collett

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

DAKOTA PRAIRIE SCHOOL DISTRICT #1
Inkster, North Dakota — File No. BPLIF-921016DF

GRAFTON PUBLIC SCHOOL DISTRICT #3
Milton, North Dakota — File No. BPLIF-931227DB

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels C1, C2, C3, and C4.

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 28, 1995; Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Dakota Prairie School District #1 (Dakota) and Grafton Public School District #3 (Grafton), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Inkster and Milton, North Dakota, respectively.

**BASIC ELIGIBILITY**

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are school districts that are accredited by the North Dakota Department of Public Instruction and that propose to serve the formal educational needs of students enrolled in schools located within and outside their jurisdictions.

**MUTUALLY EXCLUSIVE SELECTION PROCEDURE**

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established needfor an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

**Localism.** Both applicants are entitled to four points because they are school districts that propose to serve the formal educational needs of students enrolled at schools located within their jurisdictions.

**Accreditation.** Each applicant, accredited by the North Dakota Department of Public Instruction, is entitled to three points for accreditation.

**Four-Channel Limitation.** Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Dakota's illustrative schedule and grid propose an average of 24.375 hours of ITFS programming per channel per week. The grid proposes all formal educational programming. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Platte Valley School District RE-7*, 9 FCC Rcd 3164 (1994). Because of the inconsistency involving the types of programming proposed, Dakota is entitled to no programming merit points. Grafton's illustrative schedule and grid propose an average of 42 hours of formal educational programming per channel per week. Therefore, Grafton is entitled to two programming merit points.

**E- and F- Channel Group Relocation.** Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

**Total.** Dakota is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Grafton is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, Grafton is the tentative selectee.

## OTHER MATTERS

5. Grafton proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Grafton has submitted a copy of its lease with Control Technology, Inc. (CTI). Generally, the parties to an excess capacity lease agreement are identified as the lessor and lessee. The ITFS licensee is the lessor, whereas the wireless cable operator is the lessee. The lease before us identifies Grafton as the lessee and CTI as the lessor. The mislabeling of the parties would not be a problem if that occurred consistently throughout the lease. However, this is not the case. Consequently, we are not able to review the lease to determine if it conforms in all respects to the Commission's requirements. However, this does not reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. Accord. *Washington Public School*, 8 FCC Rcd 3165 (1993). Accordingly, Grafton must submit for review a lease agreement which correctly and consistently identifies the parties and their respective obligations.

6. No petitions to deny or informal objections have been filed against Grafton's application, and we find Grafton fully qualified to be an ITFS licensee. We also conclude that grant of Grafton's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Dakota Prairie School District #1 (BPLIF-921016DF) IS DENIED, and the application of Grafton Public School District #3 (BPLIF-931227DB) IS GRANTED subject to the condition that within 30 days of the release of this Order, Grafton submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

MIDWAY PUBLIC SCHOOL DISTRICT #128
Inkster, North Dakota — File No. BPLIF-921016DA

PARK RIVER PUBLIC SCHOOL DISTRICT #78
Milton, North Dakota — File No. BPLIF-931227HW

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels B1, B2, B3, and B4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995; Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Midway Public School District #128 (Midway) and Park River Public School District #78 (Park), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the areas of Inkster and Milton, North Dakota, respectively.

## BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are school districts that are accredited by the North Dakota Department of Public Instruction and that propose to serve the formal educational needs of students enrolled in schools located within and outside their jurisdictions.

## MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

**Localism.** Both applicants are entitled to four points because they are school districts that propose to serve the formal educational needs of students enrolled at schools within their jurisdictions.

**Accreditation.** Each applicant, accredited by the North Dakota Department of Public Instruction, is entitled to three points for accreditation.

**Four-Channel Limitation.** Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Midway's illustrative schedule and grid propose an average of 24.375 hours of ITFS programming per channel per week. The grid proposes all formal educational programming. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Platte Valley School District RE-7*, 9 Fcc Rcd 3164 (1994). Because of the inconsistency involving the types of programming proposed, Midway is entitled to no programming merit points. Park's illustrative schedule and grid propose an average of 42 hours of formal educational programming per channel per week. Therefore, Park is entitled to two programming merit points.

**E- and F- Channel Group Relocation.** Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

**Total.** Midway is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Park is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, Park is the tentative selectee.

## OTHER MATTERS

5. Park proposes to lease its excess capacity for non-ITFS use as permitted by 47 C.F.R. Section 74.931. Park has submitted a copy of its lease with Control Technology, Inc. (CTI). Generally, the parties to an excess capacity lease agreement are identified as the lessor and lessee. The ITFS licensee is the lessor, whereas the wireless cable operator is the lessee. The lease before us identifies Park as the lessee and CTI as the lessor. The mislabeling of the parties would not be a problem if that occurred consistently throughout the lease. However, this is not the case. Consequently, we are not able to review the lease to determine if it conforms in all respects to the Commission's requirements. However, this does not reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. Accord. *Washington Public School*, 8 FCC Rcd 3165 (1993). Accordingly, Park must submit for review a lease agreement which correctly and consistently identifies the parties and their respective obligations.

6. No petitions to deny or informal objections have been filed against Park's application, and we find Park fully qualified to be an ITFS licensee. We also conclude that grant of Park's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Midway Public School District #128 (BPLIF-921016DA) IS DENIED, and the application of Park River Public School District #78 (BPLIF-931227HW) IS GRANTED subject to the condition that within 30 days of the release of this Order, Park submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

MINTO PUBLIC SCHOOL DISTRICT #20
Inkster, North Dakota — File No. BPLIF-921016DD

CAVALIER PUBLIC SCHOOL DISTRICT #6
Milton, North Dakota — File No. BPLIF-931227DA

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels A1, A2, A3, and A4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995; Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Minto Public School District #20 (Minto) and Cavalier Public School District #6 (Cavalier), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of Inkster and Milton, North Dakota, respectively.

## BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are school districts that are accredited by the North Dakota Department of Public Instruction and that propose to serve the formal educational needs of students enrolled in schools located within and outside their jurisdictions.

## MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria: Localism. Both applicants are entitled to four points because they are school districts that propose to serve the formal educational needs of students enrolled at schools within their jurisdictions.

**Accreditation.** Each applicant, accredited by the North Dakota Department of Public Instruction, is entitled to three points for accreditation.

**Four-Channel Limitation.** Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Minto's illustrative schedule and grid propose an average of 24.375 hours of ITFS programming per channel per week. The grid proposes all formal educational programming. However, the schedule does not indicate how many hours are devoted to formal educational programming, as required by Section IV, Question 5 of the application. Accordingly, we will consider this programming as nonformal for the purpose of determining merit points. See *Platte Valley School District RE-7*, 9 FCC Rcd 3164 (1994). Because of the inconsistency involving the types of programming proposed, Minto is entitled to no programming merit points. Cavalier's illustrative schedule proposes an average of 41.375 hours of formal educational programming per channel per week, while its grid proposes an average of 42 hours of formal educational programming per channel per week. Therefore, Cavalier is deemed to have proposed an average of at least 41 hours of formal educational programming and is entitled to two programming merit points.

**E- and F- Channel Group Relocation.** Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

**Total.** Minto is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Cavalier is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, Cavalier is the tentative selectee.

## OTHER MATTERS

5. Cavalier proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Cavalier submitted a copy of its lease with Control Technology, Inc. (CTI). Generally, the parties to an excess capacity lease agreement are identified as the lessor and lessee. The ITFS licensee is the lessor, whereas the wireless cable operator is the lessee. The lease before us identifies Cavalier as the lessee and CTI as the lessor. The mislabeling of the parties would not be a problem if that occurred consistently throughout the lease. However, this is not the case. Consequently, we are not able to review the lease to determine if it conforms in all respects to the Commission's requirements. However, this does not reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. Accord. *Washington Public School*, 8 FCC Rcd 3165 (1993). Accordingly, Cavalier must submit for review a lease agreement which correctly and consistently identifies the parties and their respective obligations.

6. No petitions to deny or informal objections have been filed against Cavalier's application, and we find Cavalier fully qualified to be an ITFS licensee. We also conclude that grant of Cavalier's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Minto Public School District #20 (BPLIF-921016DD) IS DENIED, and the application of Cavalier Public School District #6 (BPLIF-931227DA) IS GRANTED subject to the condition that within 30 days of the release of this Order, Cavalier submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

SHEKINAH NETWORK File No. BPLIF-931230HM
Danville, Illinois

BOARD OF TRUSTEES COMMUNITY COLLEGE DISTRICT 535 File No. BPLIF-921113DI
Champaign, Illinois

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1-D4.

## MEMORANDUM OPINION AND ORDER

**Adopted: February 28, 1995; Released: March 9, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Shekinah Network (Shekinah) and Board of Trustees Community College District 535 (Board), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Danville and Champaign, Illinois, respectively.

### BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Each applicant is qualified to be an ITFS licensee. While Shekinah is not itself local to the Danville area, it has submitted the requisite letters of intended use from accredited schools engaged in the formal education of enrolled students which will receive its service. It has also documented the establishment of a local programming committee. Board proposes to serve students outside its jurisdiction. It too has submitted the requisite letters of intended use from accredited schools that would offer Board's programming to their students and has documented the establishment of a local program committee.

### MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is theapplicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

**Localism.** Neither applicant is entitled to four points for being local. Shekinah, based in Atascadero, California, seeks to serve the Danville, Illinois area. Because its headquarters is not located within the area it proposes to serve, Shekinah is not entitled to points for being a local applicant. See *Broken Arrow Public School District #3*, 9 FCC Rcd 5783 (1994). Similarly, Board proposes to serve the formal educational needs of students enrolled in schools outside of its jurisdiction. Accordingly, it too is not entitled to any points under this criterion. See *Pike County Board of Education*, 9 FCC Rcd 529 (1994).

**Accreditation.** Neither applicant is entitled to three points for accreditation. Although Shekinah proposes to serve accredited institutions, a factor which satisfies its basic eligibility, it is not an accredited entity in its own

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

right in the area it proposes to serve, the factor necessary for earning merit points under the accreditation criterion. Therefore, Shekinah is not entitled to any points by this measure. See *Broken Arrow Public School District #3, supra.* Similarly, Board proposes to serve the formal educational needs of students in schools outside of its jurisdiction. Board is not entitled to any points for accreditation. See *Pike County Board of Education, supra.*

**Four-Channel Limitation.** Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

**Instructional Programming.** ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Shekinah's illustrative schedule and programming grid propose an average of 21.25 hours of formal educational programming per channel per week. Thus, Shekinah is entitled to one programming merit point. In contrast, Board's illustrative schedule and grid propose an average of 4 hours of formal educational programming and 8 hours of other ITFS programming per channel per week. Because the amounts of programming specified by Board in either the illustrative schedule or the grid do not reach the threshold amount at which merit points are awarded, Board is entitled to no programming merit points.

**E- and F- Channel Group Relocation.** Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

**Total.** Shekinah is entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming, for a total of three points. Board is entitled to two points for observing the four-channel limitation. Thus, the tentative selectee is Shekinah.

## OTHER MATTERS

5. Shekinah proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Shekinah has submitted a copy of its lease with American Telecasting, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against Shekinah's application, and we find Shekinah fully qualified to be an ITFS licensee. We also conclude that grant of Shekinah's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Board of Trustees Community College District 535 (BPLIF-921113DI) IS DENIED, and the application of Shekinah Network (BPLIF-931230HM) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-95-087

Application for authority to acquire and operate facilities for service between the United States and Oman, Sri Lanka and Bangladesh.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: February 27, 1995; Released: March 9, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States on the one hand, and Oman, Sri Lanka and Bangladesh, on the other hand, by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-087 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 1.024 Mbps satellite circuit between the Beeline, Florida earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Oman, furnished by Sprint's correspondent;

b. own and operate facilities in the Beeline earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the Beeline earth station and Sprint's New York operating center;

d. use the facilities in a, b, and c, above, to provide Sprint's regularly authorized services between the United States and Oman;

e. lease a one-half interest in and operate one 64-kbps digital cable circuit in the CANTAT-2 cable, the Denmark to France DDP and the SEA-ME-WE-2 cable;

f. own and operate connecting facilities in the United States between the Canadian border and Sprint's New York operating center;

g. lease a one-half interest in and operate necessary connecting facilities in Canada and overseas;

h. use the facilities in e, f, and g, above, to provide private line service, not interconnected with the public switched network, between the United States and Sri Lanka;

i. own and operate a one-half interest in one Mbs capacity in the PTAT-1 cable;

j. own and operate connecting facilities between the United States terminal of the PTAT-1 cable and Sprint's New York operating center;

k. lease from Mercury and operate one Mbps of capacity between its earth station in the United Kingdom and an appropriate satellite over the Indian Ocean, connecting with a similar circuit between the satellite and an earth station in Bangladesh, furnished by Sprint's correspondent in Bangladesh;

l. lease a one-half interest in and operate necessary overseas connecting facilities; and

m. use the facilities in i, j, k, and l, above, to provide Sprint's regularly authorized services between the United States and Bangladesh.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Oman, Sri Lanka or Bangladesh -- that is, private lines which originate in the United States and terminate in Oman, Sri Lanka or Bangladesh or which originate in Oman, Sri Lanka or Bangladesh and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ASC TELECOM, INC. File No. I-T-C-95-088

Application for authority to operate as an international resale carrier.

LD CORPORATION File No. I-T-C-95-097

Application for authority to operate as an international resale carrier.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: February 27, 1995; Released: March 9, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-088 and I-T-C-95-097 ARE GRANTED, and ASC Telecom, Inc. and LD Corporation are authorized to provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and Sprint's Tariffs FCC Nos. 1 and 2, between the United States and the overseas points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating arrangements in each of the countries to which they provide service and shall file with the Commission any operating agreements with their correspondents within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-257**

In the Matter of

Amendment of Section 73.202(b), RM-6299
Table of Allotments,
FM Broadcast Stations,
(Kingsville and Ingleside,
Texas)

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 3, 1995; Released: March 10, 1995**

By the Chief, Policy and Rules Division:

1. The Commission has before it a Motion for Waiver of Automatic Stay filed jointly by Kingsville Radio Company, licensee of Station KNGV(FM), Kingsville, Texas and Ohio Broadcast Associates, proposed assignee of Station KNGV(FM)[1] ("Petitioner"). The motion requests that the previously granted upgrade in the allotment for Station KNGV(FM) no longer be stayed under Section 1.420(f) of the Commission's Rules. No oppositions to this motion were filed.

2. *Background.* The *Report and Order*[2] (*"R&O"*) in this proceeding granted a rulemaking petition filed by Station KNGV to substitute Channel 224C2 for Channel 224A at Kingsville, Texas, and to modify the license for Station KNGV(FM) to specify the higher class channel. The *R&O* also granted in part and dismissed in part a counterproposal filed by Roy E. Henderson, d/b/a Spanish Aural Services Company ("SASC"), permittee of Station KJIB-FM, Channel 224A, South Padre Island, Texas. Specifically, the *R&O* granted SASC's request to allot a new channel to Ingleside, Texas. The *R&O* also dismissed SASC's request to substitute Channel 224C2 for Channel 224A at South Padre Island and to modify Station KJIB-FM's construction permit to specify the higher class facilities because the proposed allotment was short-spaced to a vacant FM allotment in Mexico.

3. Thereafter, the Chief, Policy and Rules Division, denied a petition for reconsideration filed by Laser Communications, Inc. ("Laser") the successor-in-interest to SASC, on the grounds that the staff properly dismissed SASC's request to substitute Channel 224C2 for Channel 224A at South Padre Island and that the proposed site was technically deficient since it was located in water. *See Memorandum Opinion and Order,* 8 FCC Rcd 6643 (1993). Subsequently, Laser filed an application for review, pursuant to Section 1.115 of the Commission's Rules, requesting that action in the above proceeding be reversed. The filing of Laser's application for review automatically stayed the grant of the upgrade for Station KNGV(FM). *See* 47 C.F.R. § 1.420(f). *See also Arlington, TX,* 6 FCC Rcd 2050, 2051 n.2 (Comm. 1991).

4. *Motion.* Petitioner alleges that, in light of the stay imposed on the substitution of Channel 224C2 at Kingsville, it has been unable to upgrade Station KNGV(FM) as originally proposed. Petitioner further states that in order to avoid conflict with the proposed San Padre Island upgrade and to provide immediate service without the need to wait for the final termination in the rule making proceeding, it had subsequently attempted a one-step upgrade on Channel 223C2 for Station KNGV(FM). However, that application has been pending for over a year and delays have occurred in obtaining Mexican concurrence for the application. In view of these circumstances and the fact that the San Padre Island counterproposal has been dismissed twice by the Commission staff, petitioner requests that the stay be lifted without prejudice to the Commission's action on Laser's application for review.

5. *Discussion.* As requested by petitioner, we will grant its motion to lift the stay on the upgrade of Channel 224C2 at Kingsville without prejudice to any action the Commission may take on the application for review in this docketed proceeding. We believe that this action is warranted because of the seven-year delay that petitioner has experienced in attempting to upgrade the facilities of Station KNGV(FM) and its willingness to proceed at its own risk subject to the outcome of the application for review. Moreover, our action is also based upon the fact that petitioner has attempted to eliminate its conflict with Laser's counterproposal by seeking a one-step upgrade for Station KNGV(FM) on a different channel, but delays have occurred in obtaining the required concurrence of Mexico.

6. Accordingly, IT IS ORDERED, That the aforementioned Motion for Waiver of Automatic Stay filed by Kingsville Radio Company and Ohio Broadcast Associates, IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] The application for assignment of the license of KNGV(FM) from Kingsville Radio to Ohio Broadcast Associates (File No. BALH-931117GH) was approved by the Commission on March 21, 1994.
[2] 7 FCC Rcd 857 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-72**

In the Matter of

Amendment of Section 73.202(b), RM-8479
Table of Allotments,
FM Broadcast Stations.
(Odessa and Los Ybanez, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 1, 1995; Released: March 10, 1995**

By the Chief, Allocations Branch:

1. At the request of Ruben Velasquez ("petitioner"), permittee of Station KADM(FM), Channel 299C2, Odessa, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3216 (1994), proposing the substitution of Channel 300C1 for Channel 299C2 at Odessa and modification of Station KADM(FM)'s construction permit to specify operation on the higher powered channel. In order to accommodate the upgrade at Odessa, an *Order to Show Cause* was issued to Israel Ybanez ("Ybanez"), licensee of Station KYMI(FM), Los Ybanez, Texas, proposing the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez, Texas, and modification of Station KYMI(FM)'s license to specify operation on the alternate Class C2 channel. Petitioner filed comments reiterating its intention to apply for Channel 300C1 and to reimburse the licensee of Station KYMI(FM) for the reasonable cost associated with the change in channel at Los Ybanez. Ybanez filed comments in response to the *Order to Show Cause*. New Frontier Communications, Inc. ("Frontier"), filed a counterproposal, as well as an errata to its comments and counterproposal.[1] Petitioner filed reply comments.

2. Ybanez, in response to the *Order to Show Cause*, opposes the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez and modification of his license for Station KYMI(FM). Ybanez states that Station KYMI(FM)'s present dial is uncluttered and by changing its position would create audience diversion. Secondly, he submits petitioner is already able to provide 70 dBu service to 74 percent of the Odessa land area and has been granted a waiver of the community coverage rule. Ybanez argues that the Commission by granting the waiver has concluded that the public interest is served by the operation of KADM(FM) as authorized despite its slight shortfall in providing at least 80 percent coverage to Odessa. Furthermore, Ybanez believes that Odessa is a community which receives an abundance of services, noting that two Class C1 stations and one Class C are already allotted to the community. However, Ybanez states should the Commission ultimately determine that Channel 300C1 should be allotted to Odessa, he urges that petitioner be required to reimburse him for the costs associated with the change in channel. In this regard, Ybanez submits that the required reimbursement should cover the costs associated with his change in channel, including: legal, engineering, equipment, printing, promotion for the new frequency and miscellaneous expenses. He also states his willingness to cooperate with petitioner to come to an understanding as to reimbursable costs.

3. In reply comments, petitioner states that none of Ybanez reasons presented justifies denying petitioner's proposal to upgrade his facilities at Odessa. Petitioner argues that it is well settled that no licensee has a vested right in a particular channel, citing *Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990). Similarly, petitioner notes that the fact that the Commission granted KADM(FM) a waiver of the community coverage rule for its presently authorized facilities or that Odessa is served by other radio stations, is no basis for denying petitioner's proposal to improve his facilities. Finally, petitioner submits that he will reimburse Ybanez for the reasonable and prudent expenses associated with the change of channel at Los Ybanez, Texas.

4. After carefully reviewing the pleading before us, we believe the public interest would be served by substituting Channel 300C1 for Channel 299C2 at Odessa, Texas, and the substitution of Channel 253C2 for Channel 300C2 at Los Abase, Texas, since it could enable Station KADM(FM) to expand its coverage area. Further, we find Ybanez's opposition is not on point. The fact petitioner is licensed to a community which includes other radio stations and has received a waiver of the city grade coverage rules while licensed on Channel 299C2, does not diminish the benefits to be derived by upgrading its facilities. Grant of petitioner's proposal will enable Station KADM(FM) to improve its service to the public. As the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. *See, e.g. Marietta, Ohio, and Ravenswood, West Virginia*, 2 FCC Rcd 4681 (1987) and *Albany, New York et al.*, 2 FCC Rcd 4300 (1987), 3 FCC Rcd 4681 (1987).

5. With respect to the issue of reimbursement, Ybanez is generally concerned about the reimbursement of all his expenses for changing channels. Reimbursement of costs incurred by the affected station, both technical and promotional, is left to the good faith negotiation of the parties

[1] Frontier's counterproposal is unacceptable and was not placed on public notice. Frontier requested the substitution of Channel 250C for Channel 250C1 at Odessa, Texas. Our engineering review indicates that there is no technical conflict between the Odessa's upgrade and petitioner's proposal. Prior to the filing of its counterproposal, the Commission amended its Rules to permit upgrades of FM stations by a one-step application process. *See FM Channel & Class Modification by Application*, 58 FR 38534, July 19, 1993. Therefore, if Frontier so chooses to pursue its upgrade, it must avail itself of the one-step application process. In addition, the pleading filed by Frontier as well as, responsive comments are moot and will not be discussed.

involved. Reimbursement of costs incurred by the affected station is governed by the guidelines set forth in *Circleville, Ohio*, 8 FCC Rcd 2d 159 (1967). In this instance, petitioner has acknowledge his responsibility to reimburse Ybanez for the reasonable costs associated with the change in frequency for Station KYMI(FM).

6. Channel 300C1 can be allotted to Odessa in compliance with the Commission's minimum distance requirements without the imposition of a site restriction.[2] Channel 253C2 can be allotted to Los Ybanez in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KYMI(FM)'s license.[3] As requested, we will also modify Station KADM(FM) and Station KYMI(FM)'s authorizations to specify operation on Channel 300C1 and Channel 253C2, respectively. Additionally, since Odessa and Los Ybanez are located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government has been obtained for these allotments.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 27, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

| City | Channel No. |
|---|---|
| Odessa, Texas | 241C2, 245C1, 250C1, 256C, 300C1 |
| Los Ybanez, Texas | 253C2 |

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Ruben Velasquez, for Station KADM(FM), Odessa, Texas, IS MODIFIED to specify operation on Channel 300C1, in lieu of Channel 299C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Israel Ybanez, for Station KYMI(FM), Los Ybanez, IS MODIFIED to specify operation on Channel 253C2 in lieu of Channel 300C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KYMI(FM)'s license, BLH-910115KA, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-910115KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KYMI(FM), as follows: Israel Ybanez, No. 15, Los Ybanez, Texas 79331.

11. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ruben Velasquez, permittee of Station KADM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[2] The coordinates for Channel 300C1 at Odessa, Texas, are North Latitude 31-51-30 and West Longitude 102-22-30.
[3] The coordinates for Channel 253C2 at Los Ybanez are North Latitude 32-43-22 and West Longitude 102-01-50.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-84**

In the Matter of

Amendment of Section 73.202(b), RM-8478
Table of Allotments,
FM Broadcast Stations.
(Driscoll, Gregory and
Robstown, Texas)

**FURTHER NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 1, 1995; Released: March 10, 1994**

**Comment Date: May 1, 1995**
**Reply Comment Date: May 16, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3580, (1994), requesting comments on the petition for rule making filed by Cotton Broadcasting ("petitioner"), licensee of Station KMIQ(FM), Channel 286A, Robstown, Texas. Petitioner sought the substitution of Channel 283C3 for Channel 286A, the reallotment of Channel 283C3 from Robstown to Driscoll, Texas, and the modification of petitioner's license to specify Driscoll as Station KMIQ(FM)'s community of license. In order to accommodate the reallotment to Driscoll, petitioner also requested the deletion of vacant Channel 283A at Gregory, Texas.

2. In regard to the deletion of the vacant and unoccupied channel at Gregory, the *Notice* stated that we would not delete a channel where an expression of interest is demonstrated by the filing of an application. Therefore, we stated if we received an acceptable application by the initial comment period specified in the *Notice*, which in this case was September 19, 1994, petitioner's proposal to delete Channel 283A at Gregory would be dismissed. However since that time, the Commission had imposed a freeze for both new application proceedings and comparative renewal proceedings.[1] Since the application filing windows were frozen during the comment period of this proceeding, parties were unable to file an application for Channel 283A at Gregory. In order to address this inconsistency, we are issuing the *Further Notice* to set forth a comment period by which an expression of interest for Channel 283A at Gregory can be filed.

3. Parties may comment on the proposal to delete Channel 283A at Gregory, Texas. However, we will not accept counterproposals with regard to the allotment of Channel 283C3 at Driscoll, Texas.

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 1, 1995**, and reply comments on or before **May 16, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lee J. Peltzman, Esq.
Shainis & Peltzman
Suite 200
2000 L Street
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] *See FCC Freezes Comparative Proceedings*, FCC 94-41, February 25, 1994.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**WT Docket No. 95-5**

In the Matter of

Streamlining the Commission's
Antenna Structure Clearance
Procedure

and

Revision of Part 17 of the
Commission's Rules Concerning
Construction, Marking, and
Lighting of Antenna Structures

## NOTICE OF PROPOSED RULE MAKING

**Adopted: January 12, 1995; Released: January 20, 1995**

**Comment Date: March 21, 1995**
**Reply Comment Date: April 20, 1995**

By the Commission:

## I. INTRODUCTION

1. This Notice of Proposed Rule Making (Notice) proposes to streamline the Commission's antenna structure[1] clearance process, replacing the current clearance procedures which apply to licensees and permittees, with a uniform registration process for structure owners. As part of this proceeding, we propose to revise Part 17 of the Commission's Rules, "Construction, Marking, and Lighting of Antenna Structures," (Part 17) in keeping with updated recommendations by the Federal Aviation Administration (FAA). Further, we are proposing to revise applicable sections of the Commission's Rules, making owners primarily responsible for antenna structures which require painting and/or lighting. We believe that these proposals will clarify our rules, expedite the processing of authorizations involving FAA coordination, and reduce certain Commission filings by a 12 to 1 ratio.[2]

2. The Commission and the FAA each have the statutory responsibility of ensuring that antenna structures do not present a hazard to air safety. Section 303(q) of the Communications Act of 1934, as amended (Communications Act), authorizes the Commission to "require the painting and/or illumination of radio towers" in cases where there is a "reasonable possibility" that an antenna structure may cause a hazard to air navigation.[3] Similarly, Section 1501 of the Federal Aviation Act authorizes the FAA to require that persons proposing to erect a structure provide notice to the FAA, when such notice will promote air safety. In its efforts to promote safe air commerce, the FAA periodically publishes Advisory Circulars, two of which set forth its recommendations for painting and lighting of such structures.[4] In 1992, Congress amended Sections 303(q) and 503(b)(5) of the Communications Act to: 1) make antenna structure owners, as well as Commission licensees and permittees, responsible for the painting and lighting of antenna structures, and 2) provide that non-licensee antenna structure owners may be subject to forfeiture for violations of painting or lighting requirements as specified by the Commission.[5]

3. Since the late 1950's, the Commission has worked in concert with the FAA to promote air safety through the antenna structure clearance process. Currently, each applicant proposing to construct or alter an antenna structure that is more than 60.96 meters (200 feet) in height or that may interfere with a nearby airport runway must notify the FAA of proposed construction.[6] The FAA determines whether the antenna structure constitutes a potential hazard and may recommend appropriate painting and lighting for the structure.[7] The Commission then uses the FAA's recommendation to impose specific painting and/or lighting requirements on subject Commission licensees and permittees.[8]

4. We believe that our antenna structure clearance process could be modified to significantly improve the speed of disposal of certain Commission authorizations while reducing burdens on industry. Therefore, in this proceeding, we intend to replace the current clearance process with rules requiring registration of antenna structures by owners. In order to simplify the clearance process, we propose to revise FCC Form 854 to provide a specific application for registration to be filed by the antenna structure owner, instead of each licensee or permittee.[9] The registration will set forth coordinates, height, a unique registration number,

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[1] The term "antenna structures" is defined in Section 17.2(a) of the Commission's Rules, 47 C.F.R.§ 17.2(a), as, "... the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon."

[2] *See* paragraph 16, *infra*.

[3] *See* 47 U.S.C. §303(q).

[4] *See e.g. Obstruction Marking and Lighting* (AC 70/7460-1H) released in August of 1991, and *Specification for Obstruction Lighting Equipment* (AC 150/5345-43D) released in July of 1988.

[5] *See* Pub. L. No. 102-538, 106 Stat. 3533, enacted October 27, 1992. In essence, Section 503(b)(5) allows the Commission to assess forfeitures for violations of Section 303(q) of the Communications Act if the owner has been previously notified regarding specific painting and/or lighting obligations. This authority is now reflected in 47 C.F.R. § 1.80(d).

[6] *See* 14 C.F.R. § 77.13.

[7] For instance, the FAA may recommend that the proposed structure be equipped with red beacons and/or white strobe lights and be painted with white and aviation orange bands. In addition, Part 17 of the Commission's rules sets forth the requirements for painting and lighting of antenna structures, specifying the number, type and location of such lights based upon the height of the structure as well as the colors and pattern to be used in painting the structure.

[8] In most cases, painting and/or lighting requirements are specifically listed on each subject licensee's or permittee's station authorization.

[9] The current edition of FCC Form 854, "Request for Antenna Height Clearance and Obstruction Marking and Lighting Specifications," is filed with the Commission by certain applicants in

and painting and/or lighting specifications, where applicable. The revised FCC Form 854 will also be used by the antenna structure owner to: (1) reflect an increase/decrease in the height of the structure; (2) correct coordinates; (3) reflect a change in existing painting and lighting specifications; (4) notify the Commission of the dismantlement of the structure; or (5) notify the Commission of a change in ownership. In revising FCC Form 854, we emphasize that antenna structure registration will not, in any way, constitute a Commission authorization to transmit radio signals from the structure, nor relieve the owner of responsibility for compliance with applicable local or State laws. Additionally, we are proposing to revise Part 17 to reflect recent changes to the two FAA Advisory Circulars. Further, we intend to implement statutory language holding antenna structure owners primarily responsible for compliance with Commission painting and lighting specifications. In Appendix B, we are setting forth related revisions of Parts 0, 1, 17, 21, 22, 23, 25, 73, 74, 78, 80, 87, 90, 95 and 97 of our Rules.[10] We seek comment on the registration proposal discussed in this Notice, the proposed rule amendments, as well as any related matter pertaining to antenna structures used by Commission licensees or permittees.

## II. DISCUSSION

### A. ANTENNA STRUCTURE REGISTRATION

5. As part of our ongoing efforts to improve all Commission activities, we have conducted an inter-Bureau study of the processes employed in clearing antenna structures in the various services.[11] Presently, the clearance process requires identifying the coordinates and height of each structure and obtaining a determination from the FAA as to whether or not the structure is a potential hazard to air navigation. If the FAA determines that a proposed antenna structure is a potential hazard to air navigation because of its height or location, it may recommend that the structure height be decreased, recommend painting and lighting specifications, or both. The FAA, however, has no authority to require compliance with its recommendations. The Commission does have such authority and generally specifies the FAA recommendations as part of the station authorization.

6. We believe that the public interest requires adoption of a uniform procedure for registering antenna structures and the creation of a common database listing structure information.[12] Currently, the Commission has two types of databases which store antenna structure information. Painting and lighting information for each antenna structure is recorded in an "antenna clearance system" database. Station operating parameters and licensee information are maintained separately in various service databases by each operating Bureau. These service databases may or may not list painting and lighting requirements. Thus, we believe that a uniform registration procedure and a common database will yield the following benefits. First, it will speed processing of any request involving a change in coordinates, structure height, or change in painting and/or lighting.[13] Second, during investigations related to air safety or radio frequency interference, the Commission and the licensees in question may need to identify each licensee on a given antenna structure. The proposed rules would eliminate such lengthy searches of multiple databases. Third, some databases may contain inconsistent information about a single antenna structure because licensees on the structure may have submitted different site coordinates or structure parameters. A common database would facilitate detection and correction of such conflicts by the Commission and licensees. Fourth, Commission records focus on licensees and generally contain no information regarding antenna structure owners. The proposed registration process would identify each antenna structure owner in order to enforce the new Congressionally mandated provisions related to owners.[14] The following proposals will simplify the antenna clearance process for both industry and the Commission.

7. We propose a streamlined procedure for registering each antenna structure requiring notice of proposed construction to the FAA.[15] This means that a single entity, the antenna structure owner, would be primarily responsible for: (1) registering the antenna structure with the FCC; (2) maintaining the painting and lighting of the antenna struc-

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order to obtain painting and/or lighting requirements. In Appendix C, we are setting forth the revised FCC Form 854, its instructions, as well as the Registration (FCC Form 854R).

[10] Because of the ongoing proceedings related to personal communications services, we are not proposing to amend Part 24 at this time. We are not, however, exempting personal communications services from the proposals described herein. *See* paragraph 12, *infra*.

[11] The Support Services Branch of the Wireless Telecommunications Bureau in Gettysburg, Pennsylvania, processes antenna structure clearances for the Common Carrier Bureau, the International Bureau, the Mass Media Bureau, and the Wireless Telecommunications Bureau, and provides antenna structure information to the Compliance and Information Bureau.

[12] On December 19, 1991, the law firm of Fletcher, Heald & Hildreth filed a petition for rule making proposing a procedure for Mass Media Bureau licensees in which an increase/decrease in structure height would not require an application from each licensee or permittee on the structure. The proposals outlined in this Notice would permit the structure owner to file a single form to modify antenna structure data. As such, the Fletcher, Heald & Hildreth petition is being encompassed by this proceeding.

[13] Each operating Bureau has a different method of processing such requests. Specifically, Bureau processes differ in terms of forms used, notification procedures, information required, and information displayed on each licensee's authorization. For example, in the Mass Media Bureau, a change in coordinates or height of the antenna structure requires filing a lengthy application, while a change in painting or lighting requires only a notification. Both the application and notification result in reissuance of the station authorization. Processing such requests greatly increases the Commission's annual workload. For instance, in 1993 the Mass Media Bureau received 3,468 applications and 540 notifications, the Common Carrier Bureau processed 1,404 such applications, while the Wireless Telecommunications Bureau handled 11,496 applications, all involving antenna structures. In a related context, the Compliance and Information Bureau undertook 1,296 investigations involving existing antenna structures in which accurate antenna structure information was not readily available.

[14] *See* paragraph 20, *infra*.

[15] The FAA must be notified of any proposed construction or alteration involving structures which exceed 60.96 meters (200 feet) in height above ground level or structures which may interfere with aircraft landing at a nearby airport. Certain structures, however, are exempt from this notification requirement. *See* 47 C.F.R. §§ 17.7 and 17.14.

ture in accordance with the Commission's Rules; (3) notifying the Commission of any changes in height, coordinates, ownership, painting, or lighting of the structure; and (4) notifying the Commission upon dismantling the structure.[16] Although licensees and permittees have never been required to register their antenna structures, each licensee on subject structures was previously required to file with the Commission for antenna structure clearance and comply with (2) through (4) listed above. Therefore, the proposal would not impose a greater net filing burden on the public, but would instead decrease the number of entities affected by these requirements. Under this proposal, antenna structure owners who fail to comply with the requirements set forth in Part 17 may be subject to administrative sanctions.[17] Currently, licensees are individually responsible for antenna structure maintenance, even in cases where they neither own nor have a legal right to maintain the structure.

**Who must register**

8. There are approximately 500,000 antenna structures in the United States and of those, over 70,000 were subject to FAA notification prior to construction.[18] Under the proposed rules, the owner of each antenna structure requiring FAA notification would be required to file a registration application with the Commission for each applicable existing or proposed antenna structure.[19] The Commission would then issue a unique Antenna Structure Registration Number (Registration Number) to the owner. We further propose to require that the Registration Number be conspicuously displayed on or around the antenna structure and be used for identification purposes during all aspects of the licensing process by each licensee whose facilities are located on the structure.

**How to register**

9. We propose to require the antenna structure owner to obtain a Registration Number by filing revised FCC Form 854.[20] The owner would then be required to provide a copy of the Registration, FCC Form 854R, to all prospective and existing tenant licensees.[21] Thereafter, each licensee or permittee would file a copy of the Registration with the station records where it would be available to authorized Commission inspectors upon request. Upon implementation, subject licensees would be required to submit a Registration Number upon application for a new, modified, or renewed authorization.[22] The Commission would then ascertain whether the coordinates and height of the antenna structure, as supplied on the application, are consistent with the Registration. If so, a separate antenna clearance procedure would not be necessary, as painting and/or lighting would already be prescribed for the structure during the Registration process. In revising FCC Form 854, we again emphasize that Registration will not, in any way, constitute a Commission authorization to transmit radio signals from the structure.

10. Additionally, under our proposal, each owner would be required to submit revised FCC Form 854 prior to specified modifications of the antenna structure. These specified modifications to the structure are: a change in painting and lighting as recommended by the FAA; an increase or decrease in structure height (above ground level and/or above mean sea level); a change in ownership of the structure; and upon dismantlement of the structure. Further, we propose that revised Form 854 be used to notify the Commission of any corrections to antenna structure coordinates.

**When to register**

11. We propose to begin Registration by January 1, 1996. The implementation process must provide a reasonable speed of service to our customers while maintaining a simple registration scheme. We ask that commenters consider the advantages and disadvantages of the following alternatives and submit specific proposals regarding the size of initial filing windows and other implementation options not listed below.

(a) *Geographical implementation:* The United States and its possessions may be divided into any number of regions by utilizing natural boundaries, state lines, related groups of states, or sections of longitude and latitude. The Commission could then set filing windows for the registration of antenna structures by region. The Commission could permit simultaneous registration of commonly owned antenna structures, prior to their required filing window, in cases where doing so would unify the filings of an owner or group of owners.

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[16] Some licensees are currently permitted to have agreements whereby a single entity, not limited to Commission licensees, may monitor and maintain a structure. *See* 47 C.F.R. 90.441(b). Our proposal will simply centralize all aspects of antenna structure maintenance to mirror the agreements that already have evolved out of convenience in the private sector.

[17] *See* 47 U.S.C § 503(b)(5).

[18] As of November, 1994, there are over 500,000 distinct coordinates listed in the Commission's Cross Master Frequency System (XFS database), each equivalent to a single antenna structure. Of those, over 70,000 are listed in the Commission's Antenna Clearance System database, which contains information regarding those structures subject to the FAA notification requirements.

[19] Owners whose structures are exempted from current requirements under 47 C.F.R. 17.17 will nevertheless be required to comply with the proposed Registration requirements.

[20] Revised FCC Form 854, "Application for Antenna Structure Registration," would be filed for the purpose of registering structures used for wire or radio communication services by any licensee or permittee in the United States, to make changes to an existing registered structure, or to notify the Commission of the dismantlement of a structure.

[21] The term "tenant licensee," in the context of a multi-use antenna structure, refers to any licensee using the structure under a Commission station authorization. In many cases, the antenna structure owner may also be a tenant licensee.

[22] Because cellular and PCS licenses are granted on a system basis and may not contain specific site information, this requirement would not apply to the initial grant of a cellular or PCS license. *See* paragraph 13, *infra*. Further, we intend to revise applicable FCC Forms to include questions related to Registration. We intend to coordinate application and registration forms in order to eliminate duplicative questions. Once Registration is fully implemented, we would not grant an application if the Registration Number is not included or does not contain a valid explanation why Registration is unnecessary.

(b) *Implementation by antenna structure height:* Antenna structures may be divided into groups by height above ground level. The Commission could then set filing windows by structure height. The Commission could permit simultaneous registration of commonly owned antenna structures, prior to their required filing window, in cases where doing so would unify the filings of an owner or group of owners.

(c) *Implementation upon renewal:* This alternative would spread full implementation over a ten year period, to correspond with the longest license term applicable. Upon implementation, each tenant licensee on an antenna structure requiring registration would have to submit a Registration Number in order to apply for license renewal. Under this scheme, registration would be permitted at any time.

12. This proposal would apply to all structures which require FAA notification, regardless of whether the stations involved are licensed individually, by geographic service area, or employ an AM directional array.[23] Therefore, we seek specific comments regarding the effects of this proposal on cellular systems, Personal Communications Services (PCS) systems, AM broadcast stations, or any other service that does not specify each antenna site on the authorization. Under our proposal, a separate Registration would be required for each applicable structure in the licensed service area. For example, cellular authorizations issued after January 1, 1995 will only depict external cell sites which make up the outer contours of the cellular system, i.e. the Cellular Geographic Service Area (CGSA). Internal cell sites will not appear on the authorization. Further, PCS system authorizations, with few exceptions, will not specify transmitter locations. Thus, authorizations in these services will contain no painting, lighting or marking requirements for those locations not indicated on the authorization. Notwithstanding such system licensing procedures, under this proposal each antenna structure requiring FAA notification would have to be registered with the Commission.

13. Under the proposed rules, all new antenna structures would have to be registered prior to construction. Cellular and PCS applicants, however, are not generally required to specify the locations of all system antenna structures prior to the grant of a system authorization. Therefore, the proposal provides for such geographic system licensing as follows: (1) cellular and PCS applicants or applicants in any other service that are not required to specify each antenna site prior to licensing, would not be required to provide a Registration Number prior to the grant of a system authorization, and (2) each subject antenna structure would have to be registered prior to construction. Applicants in all other services, however, would be required to supply a Registration Number on their applications. In some instances, the owner may be in the process of registering the antenna structure when a prospective tenant is applying for a station license. In these cases, the Registration Number may not yet be available to the tenant. Therefore, the respective licensing bureaus would ensure that such a structure is registered prior to considering the construction permit or license application.

**Economic Impact**

14. The current procedure for processing applications and notifications requiring antenna structure clearance imposes a significant economic impact both on industry and the Commission. As an illustration, we have calculated the Commission cost on the basis of one employee hour per application or notification involving an existing antenna structure. In regard to the antenna structure clearance procedure discussed in paragraph 5, *supra*, the employee hour consists of finding the correct coordinates in the Commission's Tower Query database. If the coordinates are not in the database, it is necessary to confirm with the Support Services Branch in Gettysburg that they have the correct antenna structure information, whether this information is consistent with the application/notification, and whether the FAA has responded with the correct coordinates, height and/or obstruction marking and lighting. Under the proposed simplified procedure, these steps would not be necessary because the antenna structure would have already been cleared by Registration and be uniquely identified by its Registration Number.

15. In determining the actual cost to the Commission, the average hourly salary, per application, of the employees involved was multiplied by the number of applications, notifications, or field investigations processed last year involving an existing antenna structure. Based on 1993 data, as outlined in footnote 13, *supra*, costs exceed $500,000 annually. We have also informally surveyed six engineering consulting firms who estimate that expenditures for preparing multiple application filings involving the same antenna structure exceed $320,000 annually.

16. If adopted, Registration should streamline the regulatory process to cut costs for both the public and the federal government, improve safety in air navigation, and help speed resolution of interference complaints. The primary benefit will be a drastic reduction in the number of Commission filings. Under our proposal, each licensee or permittee at a multi-use site would not have to file an application or notification when only a change in antenna structure height or painting and lighting is involved. Instead, only the owner would be required to file with the Commission.[24] The proposed system should also hasten processing of applications which require FAA notification. Additionally, making antenna structure data available to both the federal government and the public will make it easier to provide aviators with accurate and timely information regarding new or dismantled antenna structures. Further, a single Registration database containing ownership information will allow the Commission and the FAA

[23] Many AM broadcast stations are authorized on the basis of a directional antenna. An AM directional array involves multiple antenna structures. The reference coordinates for such an AM station mark the center of the array, rather than the exact location of an antenna structure. Under our proposal, each structure in the array would be registered.

[24] On average, there are 12 separate stations authorized on each antenna structure. Therefore, when a change in height, painting or lighting occurs, the Commission would generally realize a 12 to 1 reduction in filings. Only the antenna structure owner would be required to modify the Registration.

to react swiftly to remedy lighting outages and interference complaints. We seek comments on the proposed rule amendments and the following:

a) In certain instances, owners voluntarily paint and/or illuminate their antenna structures, even though the FAA and the Commission have not recommended or required such action. The proposed rules, however, do not require the registration of voluntarily painted and/or illuminated antenna structures. What would be the advantages and/or disadvantages of requiring registration of such structures?

b) Who will require access to the new database created by our proposal? What types of information should be included and what method of access is required (e.g., on-line access, CD-ROM, quarterly hard-copy updates)?

c) What would be the advantages and/or disadvantages of permitting owners to register electronically? What would be the minimum hardware and/or software requirements necessary for registration?

d) A renewal process may be necessary in order to maintain the integrity of the Registration database. What would be the advantages and/or disadvantages of requiring each antenna structure owner to periodically renew the antenna registration? What would be a reasonable renewal period?

e) Processing Registration forms, developing a new Registration database, and providing database access to other government agencies and industry will place an economic burden on the federal government. Should a Registration fee be imposed?

f) The Commission must often resolve complaints related to the effects of radio frequency energy levels at particular antenna structure sites. A comprehensive compilation of all antenna structures would increase Commission efficiency in these studies. Therefore, we request comments on the advantages and/or disadvantages of requiring *all* antenna structures to be registered with the Commission. Alternatively, what would be the advantages and/or disadvantages of extending the proposed Registration criteria to include *all* higher powered stations, such as those of the mass media broadcasting services and common carrier microwave services?

g) Both Section 503(b) of the Communications Act and Section 1.80(d) of the Commission's Rules require that antenna structure owners be given notice of their obligations under Section 303(q) of the Communications Act prior to the issuance of a forfeiture penalty. What form of prior notice would be reasonable to inform owners of their obligation to register, paint, and light their structures (e.g., publication in the Federal Register, receipt of the Antenna Structure Registration, or a letter to the owner)?

h) What changes, if any, should be made to the Commission's environmental rules in light of these proposals? *See* 47 C.F.R. §§ 1.1301-1.1319. In particular, we seek comment on whether Registration constitutes a Commission "action" or "undertaking" under the federal environmental laws and, if so, what changes, if any, should be made to the Commission's environmental rules?

i) Nearly all of the Commission's application forms ask for antenna structure location in terms of degrees, minutes, and seconds and height in meters. What would be the advantages and/or disadvantages of amending Part 17 to require that owners specify location to the nearest second and height to the nearest meter? What methods could be used to make measurements of this accuracy and what would be the cost to each owner? Is this accuracy needed for all antenna structures or should the Commission consider each radio service separately?

### B. PART 17 UPDATE

17. In general, parties who intend to construct or modify antenna structures must seek a determination from the FAA as to whether the proposed structure is a potential hazard to air navigation.[25] In cases where an antenna structure may pose a hazard to aircraft, the FAA may recommend painting and/or lighting in accordance with two of its Advisory Circulars, *Obstruction Marking and Lighting* (AC 70/7460-1H), August 1991, and *Specification for Obstruction Lighting Equipment* (AC 150/5345-43D), July 1988.[26] The Commission has the authority to specify painting and lighting requirements other than those listed in Part 17 in cases where current guidelines are inadequate to ensure air safety.[27] Pursuant to this authority, the Commission generally relies on the FAA's recommendation, and not Part 17 of its rules, when prescribing painting and/or lighting for each licensee on a given antenna structure. For example, in cases where the FAA recommends equivalent or more stringent lighting requirements, the Commission utilizes the authority set forth in 47 C.F.R. § 17.22 to require lighting specifications not described in Part 17.

18. Because we already heavily rely on the FAA's recommendations,[28] we propose to amend Part 17 of the Commission's Rules to incorporate by reference the recommendations found in the FAA Advisory Circulars AC 70/7460-1H, August 1991 and AC 150/5345-43D, July 1988.[29] Incorporating the Advisory Circulars directly eliminates the need for Commission staff to identify changes to the Circulars, interpret such changes, and revise Part 17 to include the new language. In the future, if the FAA makes substantive amendments to either of the Advisory Circulars, the Commission may initiate a notice and comment proceeding to incorporate the new version of the Circular.

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[25] *See* 47 C.F.R. §§ 17.7 and 17.14 and 14 C.F.R. §§ 77.11-19.

[26] FAA Advisory Circulars are available upon request, free of charge, from Department of Transportation, Utilization and Storage Section (Publications), M443.2, 400 7th Street SW, Washington, DC 20591, telephone (202) 366-0039 or (202) 366-0451.

[27] *See* 47 C.F.R. 17.22.

[28] In the past, the Commission has drawn upon the FAA's expertise in order to formulate rules concerning antenna structure painting and lighting. *See*, for example, Docket 16474, 32 FR 11266, August 3, 1967.

[29] In general, documents to be incorporated by reference must meet the requirements of 1 C.F.R. Part 51. Accordingly, the Commission is currently seeking authorization from the Director of the Federal Register to incorporate by reference the two FAA Advisory Circulars.

For example, the FAA may amend AC 70/7460-1H, recommending an additional red obstruction light for structures over 46 meters (150 feet) above ground level. Alternatively, if the FAA makes nonsubstantive changes to either of the Advisory Circulars, the Chief, Wireless Telecommunications Bureau may issue an Order incorporating the updated Advisory Circular. For example, the FAA may revise AC 150/5345-43D in order to update the address for obtaining copies of FAA Advisory Circulars. Because such a change has no effect on Commission licensees, this proposal would eliminate the mention of specific painting and lighting configurations for antenna structures in Part 17 and eliminate the need to routinely amend the Commission's Rules each time FAA recommendations are revised.

19. We tentatively conclude that this proposal is in the public interest in that it updates the Commission's specific painting and lighting requirements to reflect recent FAA air safety recommendations. Because there are differences between the current FAA Advisory Circulars and Part 17, we are proposing to grandfather the present painting and lighting requirements of existing structures for 10 years.[30] Under our proposal, owners of antenna structures that received clearance prior to January 1, 1996, may retain the old painting and/or lighting requirements upon Registration and would not have to comply with the Advisory Circulars until January 1, 2006.[31] Further, each owner registering a new antenna structure on or after January 1, 1996, would be assigned painting and/or lighting requirements referenced in Part 17 at the time of Registration. The Commission may amend Part 17 to reflect updated FAA Advisory Circulars; however, antenna structures may continue to be painted and/or lighted in accordance with the requirements found on the Registration for an indefinite period. We seek comment on the proposed rule amendments.

### C. NEW REQUIREMENTS FOR ANTENNA STRUCTURE OWNERS

20. On average, there are 12 licensees authorized to transmit from each antenna structure requiring painting and/or lighting. Currently, each licensee on a multi-use antenna structure is separately and jointly responsible for the installation and maintenance of the structure in accordance with Part 17.[32] The Commission has found, however, that oftentimes the antenna structure owner is not a Commission licensee and therefore, has no vested interest in compliance. This poses a hazard to air commerce in cases where all Commission licensees vacate an antenna structure and the owner fails to paint, light, or dismantle the structure.

21. As discussed previously, Congress remedied this situation by enacting Public Law No. 102-538, 106 Stat. 3533, which, among other things, amended the Communications Act to make owners, as well as Commission licensees or permittees, responsible for the painting and lighting of antenna structures.[33] While still recognizing the ultimate shared responsibility of licensees, permittees, and owners, we are proposing rules to hold the owner primarily responsible, in the first instance, for the installation and maintenance of painting and/or lighting for each antenna structure. This means that the Commission would look first toward antenna structure owners to ensure that their structures are painted and lighted in accordance with Part 17. In cases where reliance on the structure owner proves ineffective, the Commission would turn toward the tenant licensees and permittees to ensure that the structure is properly painted and lighted. For instance, if the structure owner cannot be reached, the Commission would have the option to require tenant licensees and permittees to maintain the structure. By focusing on the single entity which has control over all aspects of the antenna structure, the Commission hopes to speed resolution of problems associated with lighting outages and vacant antenna structures. Under this proposal, antenna structure owners who fail to comply with the requirements set forth in Part 17 may be subject to administrative sanctions.[34] Therefore, we propose to amend Part 17, making antenna structure owners primarily responsible for structure painting and lighting.

22. Because aviators often use lighted antenna structures as landmarks,[35] it is necessary for the lighting of all antenna structures to be consistent and maintained to ensure safety of air navigation. Therefore, in addition to the amendments discussed above, we intend to require owners whose antenna structures do not require lighting, but choose to voluntarily light their structures, to follow the lighting installation and maintenance specifications set forth in Part 17. Such owners would be free to discontinue lighting their structures at any time. We believe this lighting requirement may be necessary to insure that aviators do not misinterpret the height of structures that are lit voluntarily, such as an antenna structure with lower level lights, but no top beacon. We seek comment on the proposed rule amendments.

### D. Summary

23. In this Notice, we are proposing to: implement Antenna Structure Registration, revise the Commission's Rules regarding antenna structure painting and lighting to reference the FAA's Advisory Circulars; and, implement statutory requirements set forth by Congress to make antenna structure owners primarily responsible for structure

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[30] For example, AC 70/7460-1H recommends dual lamps in mid-level beacons for certain structures, while Part 17 requires only a single lamp for the same structures. See AC 70/7460-1H, Chapter 5, August 1991, and 47 C.F.R. Part 17, respectively.

[31] In order to change the Registration to reflect the Advisory Circulars in force, an owner must file FAA Form 7460-1, obtain a new FAA recommendation for painting and/or lighting the antenna structure, and file FCC Form 854 to amend the Registration.

[32] As stated previously, approximately 70,000 antenna structures are required to be painted and/or illuminated. *See* footnote 18 *supra*. Currently, most tenant licensees' radio station authorizations contains specific painting and/or lighting requirements. Presently, the Commission holds each tenant licensee individually accountable under the Commission's Rules.

[33] *See* paragraph 2, *supra*.

[34] *See* 47 U.S.C. § 503(b)(5). *See* also, *Notice of Apparent Liability for Forfeiture*, adopted December 16, 1994, 9 FCC Rcd. _____(1994), wherein the Commission issued an apparent liability for forfeiture to Centel Cellular of North Carolina Limited Partnership in the amount of $3,000,000 for various apparent violations of Part 17.

[35] *See Airman's Information Manual: Basic Flight Information and ATC Procedures (BFAP)*, U.S. Department of Transportation, Federal Aviation Administration, paragraphs 2-13 and 7-73, February 4, 1993.

operation and maintenance. By these actions, we seek to ease the burden on Commission resources and expedite application and notification processing, streamline regulations to ease the public and governmental burdens associated with processing certain applications, unify federal regulations regarding antenna structure painting and lighting, increase safety in air navigation, and establish that primary responsibility for antenna structure operation and maintenance rests with the owner. We seek comment on the proposed rule amendments and policies discussed above.

## III. PROCEDURAL MATTERS

### INITIAL REGULATORY FLEXIBILITY ANALYSIS

24. An Initial Regulatory Flexibility Analysis is contained in Appendix A to this Notice of Proposed Rule Making.

25. Accordingly, we adopt this Notice of Proposed Rule Making under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested persons may file comments on or before *(60 days after the release date)* and may file reply comments on or before *(90 days after the release date)*. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you should file an original and nine copies. You should send your comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

26. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.206(a).

27. For further information, contact Roger Noel of the Wireless Telecommunications Bureau at (202) 418-0680 or Robert Greenberg of the Mass Media Bureau at (202) 418-2720.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachments

## APPENDIX A

### INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals contained in this Notice. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 25, *supra*. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

**A. Reason for Action**

2. The Commission proposes to: 1) institute a procedure to register certain antenna structures, used by Commission licensees and permittees, which require notice to the FAA of proposed construction, 2) revise the Commission's painting and lighting requirements to incorporate by reference FAA Advisory Circulars AC 70/7460-1H (August 1991) and AC 150/5345-43D (July 1988), and 3) hold antenna structure owners primarily responsible for compliance with the Commission's painting and lighting requirements.

**B. Objectives**

3. We seek to: 1) reduce the number of filings to the Commission regarding changes to antenna structures, 2) expedite application and notification processing, 3) unify and streamline federal painting and lighting regulations to ease the public and governmental burdens associated with processing certain applications, 4) increase safety in air navigation.

**C. Legal Basis**

4. The proposed actions are authorized under Sections 4(i), 4(j) and 303(r) of the Communications Act 47 U.S.C. §§ 154(i), 154(j), and 303(r).

**D. Reporting, Recordkeeping and Other Compliance Requirements**

5. The proposed revision of 47 C.F.R. Part 17 would require certain antenna structure owners to register their structures and to comply with the Commission's painting and lighting requirements. Additionally, each owner would have to provide a copy of the Antenna Structure Registration to all tenant licensees and post the structure's Registration Number at the site. Further, the proposed rules eliminate the requirement for certain licensees and permittees to individually file with the Commission to amend structure height or painting and lighting specifications. Most licensees and permittees, however, would have to provide the Registration Number of the structure from which they intend to transmit when filing for a new, modified, or renewed authorization.

**E. Federal Rules Which Overlap, Duplicate or Conflict with These Rules**

6. None.

**F. Description, Potential Impact, and Small Entities Involved**

7. Any rule change requiring a small business antenna structure owner to file an application for Registration could affect small a business. However, the overall impact, if any, will be minimal because the proposed registration process will eliminate the need for many small business licensees and permittees on an antenna structure to file certain applications and notifications. The Commission will further examine the impact of any rule changes on small entities after evaluating the comments in this proceeding.

**G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives**

8. None.

## APPENDIX B

## PROPOSED RULES

Chapter I of Title 47 of the Code of Federal Regulations, Parts 0, 1,17, 21, 22, 23, 25, 73, 74, 78, 80, 87, 90, 94, 95, and 97 are proposed to be amended as follows:

**I. Part 0 - Commission Organization**

1. The authority citation for Part 0 continues to read as follows:

**AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.**

2. Section 0.131 is amended by revising paragraph (j) to read as follows:

**§ 0.131 Functions of the Bureau.**

* * * * *

(j) Adminsters the Commission's commercial radio operator program (part 13) and the Commission's program for registration, construction, marking and lighting of antenna structures (part 17).

* * * * *

**II. Part 1 - Practice and Procedure**

1. The authority citation for Part 1 continues to read as follows:

**AUTHORITY: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552, 21 U.S.C. 853a, unless otherwise noted.**

2. Section 1.61 is amended by deleting paragraphs (c), (d), (e), and (f) and revising paragraphs (a) and (b) to read as follows:

**§ 1.61 Procedures for handling applications requiring special aeronautical study.**

(a) Antenna Structure Registration is conducted by the Wireless Telecommunications Bureau as follows:

(1) Each antenna structure owner that must notify the FAA of proposed construction using FAA Form 7460-1 shall, upon proposing new or modified construction, register that antenna structure with the Wireless Telecommunications Bureau using FCC Form 854.

(2) Upon receipt of FCC Form 854, and attached final FAA determination of "no hazard," the Bureau prescribes antenna structure painting and/or lighting specifications or other conditions in accordance with the FAA airspace recommendation and returns a completed Antenna Structure Registration (FCC Form 854R) to the applicant. If the proposed structure is disapproved the applicant is so advised.

(b) Each operating Bureau examines the applications for Commission authorization for which it is responsible to ensure compliance with FAA notification procedures as well as Commission Antenna Structure Registration as follows:

(1) If Antenna Structure Registration is required, the operating Bureau reviews the application for the Antenna Structure Registration Number and proceeds as follows:

(i) If the application contains the Antenna Structure Registration Number or if the applicant seeks a Cellular or PCS system authorization, the operating Bureau processes the application.

(ii) If the application does not contain the Antenna Structure Registration Number, but the structure owner has already filed FCC Form 854, the operating Bureau places the application on hold until Registration can be confirmed, so long as the applicant exhibits due diligence in filing.

(iii) If the application does not contain the Antenna Structure Registration Number, and the structure owner has not filed FCC Form 854, the operating Bureau notifies the applicant that FCC Form 854 must be filed and places the application on hold until Registration can be confirmed, so long as the owner exhibits due diligence in filing.

(2) If Antenna Structure Registration is not required, the operating Bureau processes the application.

* * * * *

**III. Part 17 - Construction, Marking, and Lighting of Antenna Structures**

1. The authority citation for Part 17 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply secs. 301, 309, 48 Stat. 1081, 1085 as amended; 47 U.S.C. 301, 309.**

2. Section 17.1 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 17.1 Basis and purpose.**

(a) * * *and necessity would be served thereby, and to require the painting, and/or illumination of antenna structures if and when in its judgment such structures constitute* * * (b) * * *part is to prescribe certain procedures for antenna structure registration and standards with respect* * *

* * * * *

3. Section 17.2 is amended by revising paragraph (a) and adding new paragraphs (c) and (d) to read as follows:

**§ 17.2 Definitions.**

(a) *Antenna structure*. The term antenna structure includes the* * *

(b) * * *

(c) *Antenna Structure Registration Number*. A unique number, issued by the Commission during the registration process, which identies an antenna structure and must be used in later filings.

(d) *Owner*. For the purposes of this part, an antenna structure owner is either the entity that owns the structure *or* the entity designated by the owner to maintain the antenna structure in accordance with this part. The antenna structure owner, however, is ultimately responsibile for compliance with the requirements of this part.

4. Section 17.4 is amended by revising paragraphs (a), (b), and (d), deleting paragraphs (f) and (h), and redesignating paragraph (g) as paragraph (f) to read as follows:

**§ 17.4 Commission consideration of proposed antenna structure with respect to possible hazard to air navigation.**

(a) All applications are reviewed to determine whether there is a requirement that the applicant file a Notice of Proposed Construction or Alteration (FAA Form 7460-1) with the Federal Aviation Administration.

(b) * * *will be advised to do so unless the FCC Form 854 includes an determination of "no hazard" or notes that FAA Form 7460-1 has already been filed.

* * * * *

(d) * * *is deemed not to involve a hazard to air navigation and the Antenna Registration will be processed accordingly: Provided, that the FAA determination of "no hazard" had not expired prior to the date FCC Form 854 was filed.

* * * * *

5. A new Section 17.5 is added to read as follows:

**§ 17.5 Antenna Structure Registration.**

Effective January 1, 1996, the owner of any proposed or existing antenna structure that requires notice of proposed construction to the Federal Aviation Administration must register the structure with the Commision. For proposed structures, registration must take place prior to construction. This includes those structures used as part of stations licensed by the Commission for the transmission of radio energy, or to be used as part of a cable television head end system. If a Federal Government antenna structure is to be used by a Commission licensee, the structure must be registered with the Commission.

(a) Each owner must file FCC Form 854 with the Commission. Additionally, each owner of a proposed structure must submit a copy of the FAA determination of "no hazard." A copy of a FAA determination of "no hazard" is not required if FAA notification is not required under Section 17.7 of this chapter. The height of the structure will include the highest point of the structure including any obstruction lighting or lighting arrester.

(c) The Commission shall issue, to the owner, FCC Form 854R, Antenna Structure Registration, which assigns a unique Antenna Structure Registration Number. The structure owner shall provide a copy of Form 854R to each tenant licensee and permittee. The Antenna Structure Registration Number must be displayed in a conspicuous place so that it is readily visible from the base of the antenna structure. Materials used to display the Antenna Structure Registration Number must be weather-resistant and of sufficient size to be easily seen at the base of the antenna structure.

6. A new Section 17.6 is added to read as follows:

**§ 17.6 Responsibility of Commission licensees and permittees.**

In the event of default by the antenna strucuture owner, each licensee or permittee authorized on an antenna structure shall be responsible for ensuring that the structure complies with the requirements of this part.

7. Section 17.14 is amended by revising paragraph (a) to read as follows:

**§ 17.14 Certain antenna structures exempt from notification to the FAA.**

* * * * *

(a) * * *topographic features of equal or greater height, *and* would be located in the congested area* * *

* * * * *

8. Section 17.17 is amended by revising paragraph (a) to read as follows:

**§ 17.17 Existing structures.**

(a) The requirements found in this Part related to painting and lighting of antenna structures shall not apply to those structures authorized prior to September 5, 1967. The Antenna Structure Registration requirements found in Section 17.5 of this Part, however, shall apply to all antenna structures, regardless of prior authorization.

* * * * *

9. Section 17.23 is amended by replacing the prior text with the following to read as follows:

**§ 17.23 Specifications for painting and lighting antenna structures.**

Except as provided in Section 17.25 of this chapter, each antenna structure to be registered on or after January 1, 1996, must conform to the FAA's painting and lighting recommendations set forth on the structure's FAA determination of "no hazard," as referenced in the following FAA Advisory Circulars: AC 70/7460-1H, "Obstruction Marking and Lighting," August 1, 1991, and AC 150/5345-43D, "Specification for Obstruction Lighting Equipment," July 15, 1988. These documents are incorporated by reference in accordance with 5 U.S.C. 552(a). The documents contain FAA recommendations for painting and lighting structures which pose a potential hazard to air navigation. For purposes of this part, the specifications, standards, and general requirements stated in these documents are mandatory. The Advisory Circulars listed above are available for inspection at the Commission Headquarters in Washington, DC, or may be obtained from Department of Transportation, Utilization and Storage Section (Publications), M443.2, 400 7th Street SW, Washington, DC 20590, telephone (202) 366-0039 or (202) 366-0451.

10. Sections 17.24 through 17.42 are deleted from this Part.

11. Sections 17.43, 17.45, 17.47, 17.48, 17.49, 17.50, 17.51, 17.53, 17.54, 17.56, 17.57, and 17.58 are renumbered as 17.25, 17.27, 17.29, 17.31, 17.33, 17.35, 17.37, 17.39, 17.41, 17.43, 17.45, and 17.47 respectively.

12. The new Section 17.25 is amended by revising the title, revising paragraph (a), deleting paragraphs (b) and (c), and redesignating paragraph (d) as paragraph (b) to read as follows:

**§ 17.25 Painting and lighting of existing structures.**

(a) Effective January 1, 1996, each antenna structure required to be painted and/or lighted under this part must do so in accordance with one of the following:

(1) the FAA Advisory Circulars listed in Section 17.23 of this chapter;

(2) the FAA Advisory Circulars listed on the structure's Antena Structure Registration (FCC Form 854R); or,

(3) until January 1, 2006, the painting and lighting requirements assigned by the Commission.

* * * * *

13. A new Section 17.26 is added to read as follows:

**§ 17.26 Voluntary lighting of antenna structures.**

Voluntary lighting of an antenna structure is authorized if lighted and maintained in accordance with the requirements of this part.

14. The new Section 17.29 is amended by revising the title, introductory paragraph, and paragraphs (a)(1), (a)(2), and (b) to read as follows:

**§ 17.29 Inspection of antena structure lights and associated control equipment.**

The owner of any antenna structure which* * *

(a)(1) Shall make an observation of the antenna structure's lights at least once* * *

(a)(2) * * *provide indication of such failure to the owner.

(b) * * *alarm systems associate with the antenna structure lighting to insure that such apparatus is functioning properly.

15. The new Section 17.31 is amended by revising the introductory paragraph and paragraph (a) to read as follows:

**§ 17.31 Notification of extinguishment or improper functioning of lights.**

The owner of any antenna structure which* * *

(a) * * *the circumstances which caused the failure, the probable date for restoration of service, the FCC Antenna Structure Registration Number, and the height of the structure (AGL and AMSL if known). Further notification* * *

* * * * *

16. The new Section 17.33 is amended by revising the title, the introductory paragraph, and adding a new paragraph (d) to read as follows:

**§17.33 Recording of antenna structure light inspections in the owner record.**

The owner of each antenna structure requiring registration under this part, must maintain a record of any observed or otherwise known extinguishment or improper functioning of a structure light and include the following information for each such event:

* * * * *

(d) Name, title, address, and telephone number of the person making the report

17. The new Section 17.35 is amended by revising the sentence to read as follows:

**§ 17.35 Cleaning and repainting.**

All antenna structures shall be cleaned or repainted as often as necessary to maintain good visibility.

18. The new Section 17.45 is amended by revising the previous text to read as follows:

**§ 17.45 Report of radio transmitting antenna construction, alteration, and/or removal.**

The owner of an antenna structure for which painting or lighting is required and for which an Antenna Structure Registration Number has been obtained must, prior to start of antenna structure construction and upon completion of such construction or changes, notify the Commission within 24 hours of completion of construction and/or dismantlement.

**IV. Part 21 - Domestic Public Fixed Radio Services**

1. The authority citation for Part 21 continues to read as follows:

**AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554.**

2. Section 21.11 is amended by revising paragraph (g) to read as follows:

**§ 21.11 Miscellaneous forms shared by all domestic public radio services.**

* * * * *

(g) *Antenna Structure Registration.* FCC Form 854 (Application for Antenna Structure Registration) accompanied by a final Federal Aviation Administration (FAA) determination of "no hazard" must be filed by the antenna structure owner to receive an antenna structure registration number. Criteria used to determine whether FAA notification is required for a particular antenna structure are contained in Part 17 of this chapter.

3. Section 21.15 is amended by revising paragraph (d), inserting a new paragraph (e), and redesignating paragraphs (e), (f), and (g) as (f), (g), and (h), respectively.

**§ 21.15 Technical content of applications.**

* * * * *

(d) *FAA notification.* Before the construction of a new antenna structure or alteration in the height of an existing structure (including a receive-only or passive repeater) is authorized by the FCC, a Federal Aviation Administration (FAA) determination of "no hazard" may be required. To apply for this determination, antenna structure owners must notify the FAA of the planned construction. Criteria used to determine whether FAA notification is required for a particular antenna structure are contained in Part 17 of this chapter. Applications proposing construction of a new antenna structure or alteration of the overall height of an existing antenna structure, where FAA notification prior to such construction or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the reason is obvious ( *e.g.* structure height is less than 6.1 meters AGL) must state why FAA notification is not required. See also 21.111 if the structure is used by more than one station.

(e) *Antenna Structure Registration Number.* Applications proposing construction of a new antenna structure or alteration of the overall height of an existing antenna structure, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number for the affected structure. If no such number has been assigned at the time the application is filed, the applicant must state in the application whether or not the antenna structure owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this structure for the antenna structure in question.

* * * * *

4. Section 21.41 is amended by revising paragraph (c)(3) to read as follows:

**§ 21.41 Special processing of applications for minor facilities modifications.**

* * * * *

(c) * * *

(3) Changes in the geographical coordinates of a transmit station, receive station or passive facility by ten seconds or less of latitude, longitude or both, provided that when notice to the FAA of proposed construction is required by Part 17 of the rules for the antenna structure at the previously authorized coordinates (or will be required at the new location) the applicant must comply with the provisions of 21.15(e).

* * * * *

5. Section 21.42 is amended by revising paragraph (c)(6) to read as follows:

**§ 21.42 Certain modifications not requiring prior authorizations.**

* * * * *

(c) * * *

(6) Decreases in the overall height of an antenna structure, provided that, when notice to the FAA of proposed construction was required by Part 17 of the Rules for the antenna structure at the previously authorized height, the applicant must comply with the provisions of 21.15(d) and 21.15(e).

* * * * *

6. Section 21.111 is amended by replacing the prior text with the following:

**§ 21.111 Use of common antenna structure.**

The simultaneous use of a common antenna structure by more than one station authorized under this part, or by one or more stations of any other service may be authorized. The owner, however, of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall install and maintain the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

7. Section 21.112 is amended to read as follows:

**§ 21.112 Marking of antenna structures.**

No owner, conditional licensee, or licensee of an antenna structure for which obstruction marking or lighting is required and for which an antenna structure registration number has been obtained, shall discontinue the required painting or lighting without having obtained prior written authorization therefor from the Commission. (For complete regulations relative to antenna marking requirements, see Part 17 of this chapter.)

8. Section 21.117 is amended by revising paragraph (b) to read as follows:

**§ 21.117 Transmitter location.**

* * * * *

(b) The owner of the antenna structure should locate and construct such structure as to avoid making them hazardous to air navigation. (See Part 17 of this chapter for provisions relating to antenna structures.) Such installation shall be maintained in good structural condition together with any required painting or lighting.

**V. Part 22 - Public Mobile Service.**

1. The authority citation for Part 22 continues to read as follows:

**AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.**

1. Section 22.115 is amended by revising paragraphs (a)(2) and (a)(3) to read as follows:

**§ 22.115 Content of applications.**

* * * * *

(a) * * *

(2) *FAA notification.* Before the construction of new antenna structures or alteration in the height of existing antenna structures is authorized by the FCC, a Federal Aviation Administration (FAA) determination of "no hazard" may be required. To apply for this determination, antenna structure owners must notify the FAA of the planned construction. Criteria used to determine whether FAA notification is required for a particular antenna structure are contained in Part 17 of this chapter. Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the reason is obvious (*e.g.* structure height is less than 6.10 meters AGL) must contain a statement explaining why FAA notification is not required.

(3) *Antenna Structure Registration Number.* Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number(s) for the affected structure(s). If no such number has been assigned at the time the application is filed, the applicant must state in the application whether or not the antenna structure owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this chapter for the antenna structure in question.

* * * * * *

2. Section 22.143 is amended by revising paragraph (d)(4) to read as follows:

**§ 22.143 Construction prior to grant of application.**

* * * * *

(d) * * *

(4) For applications involving construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, the antenna structure owner must obtain a Federal Aviation Administration (FAA) determination of "no hazard" and a FCC Antenna Structure Registration Number for each such antenna structure before construction or alteration of the antenna structure may begin.

* * * * *

3. Section 22.163 is amended by revising paragraph (c) to read as follows:

**§ 22.163 Minor modifications to existing stations.**

* * * * *

(c) *Antenna Structure Registration.* For modifications involving construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, the antenna structure owner(s) must receive a Federal Aviation Administration (FAA) determination of "no hazard" and an FCC Antenna Structure Registration Number for each such antenna structure before construction or alteration of the antenna structure may begin.

* * * * *

4. Section 22.165 is amended by revising paragraph (b) as follows:

**§ 22.165 Additional transmitters for existing systems.**

* * * * *

(b) *Antenna Structure Registration.* For additional transmitters involving construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, the antenna structure owner(s) must receive a Federal Aviation Administration (FAA) determination of "no hazard" and an FCC Antenna Structure Registration Number for each such antenna structure before construction or alteration of the antenna structure may begin.

* * * * *

5. Section 22.365 is amended to read as follows:

**§ 22.365 Antenna structures; air navigation safety.**

(a) *Painting and lighting.* The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and maintain the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

(b) *Maintenance contracts.* Each antenna structure owner or licensee authorized to transmit from a given antenna structure may enter into a contract with an entity to monitor and carry out necessary maintenance of the antenna structure. The antenna structure owner, however, is primarily responsible for compliance with Part 17 of this chapter.

**VI. Part 23 - International Fixed Public Radiocommunication Services**

1. The authority citation for Part 23 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303. Interpret or apply sec. 301, 48 Stat. 1081; 47 U.S.C. 301.**

2. Section 23.39 is amended by revising the title and replacing the previous text with new paragraphs (a), (b), and (c) to read as follows:

**§ 23.39 Antenna Structures.**

(a) *FAA notification.* Before the construction of new antenna structures or alteration in the height of existing antenna structures is authorized by the FCC, a Federal Aviation Administration (FAA) determination of "no hazard" may be required. To apply for this determination, antenna structure owners must notify the FAA of the planned construction. Criteria used to determine whether FAA notification is required for a particular antenna structure are contained in Part 17 of this chapter. Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more exsiting antenna structures, where FAA notification prior to such construction or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the reason is obvious (*e.g.* structure height is less than 6.10 meters AGL) must contain a statement explaining why FAA notification is not required.

(b) *Painting and lighting.* The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and maintain the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

(c) *Antenna Structure Registration Number.* Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more existing structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number(s) for the affected structure(s). If no such number has been assigned at the time the application is filed, the applicant must state in the application whether or not the antenna structure owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this chapter for the antenna structure in question.

3. Section 23.28 is amended by adding a new paragraph (c) to read as follows:

**§ 23.28 Special Temporary Authorization.**

* * * * * *

(c) Each application proposing construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number(s) for the affected structure(s). If no such number has been assigned at the time the application(s) is filed, the applicant must state in the application whether the owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this chapter. Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more existing antenna structures, where FAA notification prior to such construction or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the stucture is 6.10-meters or less above ground level (AGL), must contain a statement explaining why FAA notification is not required.

4. Section 23.40 is amended by revising the title and deleting the previous text to read as follows:

**§ 23.40 [Reserved]**

* * * * * *

**VII. Part 25 - Satellite Communications**

1. The authority citation for Part 24 continues to read as follows:

**AUTHORITY: Secs. 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744; 47 U.S.C. 554.**

2. Section 25.113 is amended by revising paragraph(c), redesignating paragraph (d) as paragraph (f), and adding two new paragraphs (d) and (e) to read as follows:

**§ 25.113 Construction Permits.**

* * * * *

(c) *FAA notification.* Before the construction of new antenna structures or alteration in the height of existing antenna structures is authorized by the FCC, a Federal Aviation Administration (FAA) determination of "no hazard" may be required. To apply for this determination, antenna structure owners must notify the FAA of the planned construction. Criteria used to determine whether FAA notification is required for a particular antenna structure are contained in Part 17 of this chapter. Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more exsiting antenna structures, where FAA notification prior

to such construction or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the reason is obvious (*e.g.* structure height is less than 6.10 meters AGL) must contain a statement explaining why FAA notification is not required.

(d) *Painting and lighting.* The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and maintain the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

(e) *Antenna Structure Registration Number.* Applications proposing construction of one or more new antenna structures or alteration of the overall height of one or more existing structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number(s) for the affected structure(s). If no such number has been assigned at the time the application is filed, the applicant must state in the application whether or not the antenna structure owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this chapter for the antenna structure in question.

* * * * *

3. Section 25.119 is amended by adding a new paragraph (c) to read as follows:

**§ 25.119 Application for special temporary authorization.**

* * * * *

(c) Each application proposing construction of one or more earth station antennas or alteration of the overall height of one or more existing earth station antenna structures, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number (s) for the affected satellite earth station antenna(s). If no such number has been assigned at the time the application(s) is filed, the applicant must state in the application whether the satellite earth station antenna owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this chapter. Applications proposing construction of one or more earth station antennas or alteration of the overall height of one or more existing earth station antennas, where FAA notification prior to such construction or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the satellite earth station antenna is 6.10-meters or less above ground level (AGL), must contain a statement explaining why FAA notification is not required.

4. Section 25.130 is amended by adding a new paragraph (e) to read as follows:

**§ 25.130 Filing requirements for transmitting earth stations.**

* * * * *

(e) Each application proposing construction of one or more earth station antennas or alteration of the overall height of one or more existing earth station antennas, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number(s) for the affected satellite earth station antenna(s). If no such number has been assigned at the time the application(s) is filed, the applicant must state in the application whether the satellite earth station antenna owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an antenna Structure Registration Number in accordance with Part 17 of this chapter. Applications proposing construction of one or more earth station antennas or alteration of the overall height of one or more existing earth station antennas, where FAA notification prior to such construction or notification or alteration is *not* required by Part 17 of this chapter, must indicate such and, unless the satellite earth station antenna is 6.10-meters or less above ground level (AGL), must contain a statement explaining why FAA notification is not required.

5. Section 25.300 is amended by revising paragraph (h) to read as follows:

**§ 25.300 Developmental Operations.**

* * * * * *

(h) Each application for developmental operation proposing construction of one or more earth station antennas or alteration of the overall height of one or more existing earth station antennas, where FAA notification prior to such construction or alteration is required by Part 17 of this chapter, must include the FCC Antenna Structure Registration Number(s) for the affected satellite earth station antenna(s). If no such number has been assigned at the time the application is filed, the applicant must state in the application whether the satellite earth station antenna owner has notified the FAA of the proposed construction or alteration and applied to the FCC for an Antenna Structure Registration Number in accordance with Part 17 of this chapter. Applications proposing construction of one or more earth station antennas or alteration of the overall height of none or more existing earth station antennas, where FAA notification prior to such construction or notification or alteration is *not* required by Part 71 of this chapter, must indicate such and, unless the satellite earth station antenna is 6.10-meters or less above ground level (AGL), must contain a statement explaining why FAA notification is not required.

* * * * * *

**VIII. Part 73 - Radio Broadcast Services**

1. The authority citation for Part 73 continues to read as follows:

**AUTHORITY: 47 U.S.C. 154, 303, 334.**

2. Section 73.1213 is amended by revising paragraph (b) and deleting paragraph (c) to read as follows:

**§73.1213 Antenna structure, marking and lighting.**

*****

(b) The owner of each antenna structure is responsbile for ensuring that the structure, if required, is painted and/or illuminated in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be responsible for ensuring that the structure complies with applicable painting and lighting requirements.

3. Section 73.1690 is amended by revising paragraph (b)(1) to read as follows:

**§73.1690 Modification of transmission systems.**

* * * * *

(b) ***

(1) Any change in the location, or directional radiation characteristics of a directional antenna system. (See §73.45 and §73.150, AM; §73.316, FM; or §73.685, TV.)

* * * * *

4. Section 73.3533 is amended by adding a new paragraph (c) to read as follows:

**§73.3533 Application for construction permit or modification of construction permit.**

* * * * *

(c) In each application referred to in subsection (a), the applicant will provide the Antenna Structure Registration Number (FCC Form 854R) of the antenna structure upon which it will locate its proposed antenna. In the event the antenna structure does not already have a Registration Number, either the antenna structure owner shall file FCC Form 854 ("Application for Antenna Structure Registration") in accordance with Part 17 of this chapter or the applicant shall provide a detailed explanation why registration and clearance of the antenna structure is not necessary.

**IX. Part 74 - Experimental, Auxiliary, and Special Broadcast and Other Program Distributional Services**

1. The authority citation for Part 74 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, 554.**

2. Section 74.22 is amended to read as follows:

**§74.22 Use of common antenna structure.**

The simultaneous use of a common antenna structure by more than one station authorized under this part, or by one or more stations of any other service may be authorized. The owner of each antenna structure is responsbile for ensuring that the structure, if required, is painted and/or illuminated in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be responsible for ensuring that the structure complies with applicable painting and lighting requirements.

3. Section 74.551 is amended by adding a new paragraph (c) to read as follows:

**§74.551 Equipment changes.**

* * * * *

(c) Any application proposing a change in the height of the antenna structure or its location must also include the Antenna Structure Registration Number (FCC Form 854R) of the antenna structure upon which it will locate its proposed antenna. In the event the antenna structure does not have a Registration Number, either the antenna structure owner shall file FCC Form 854 ("Application for Antenna Structure Registration") in accordance with Part 17 of this chapter or the applicant shall provide a detailed explanation why registration and clearance are not necessary.

4. Section 74.651 is amended by adding a new paragraph (d) to read as follows:

**§74.651 Equipment changes.**

* * * * *

(d) Any application proposing a change in the height of the antenna or its location must also include the Antenna Structure Registration Number (FCC Form 854R) of the antenna structure upon which it will locate its proposed antenna. In the event the antenna structure does not have a Registration Number, either the antenna structure owner shall file FCC Form 854 ("Application for Antenna Structure Registration") in accordance with Part 17 of this chapter or the applicant shall provide a detailed explanation why registration and clearance are not necessary.

5. Section 74.1251 is amended by adding a new paragraph (d) to read as follows:

**§74.1251 Technical and equipment modifications.**

* * * * *

(d) Any application proposing a change in the height of the antenna structure or its location must also include the Antenna Structure Registration Number (FCC Form 854R) of the antenna structure upon which it proposes to locate its antenna. In the event the antenna structure does not have a Registration Number, either the antenna structure owner shall file FCC Form 854 ("Application for Antenna Structure Registration") in accordance with Part 17 of this chapter or the applicant shall provide a detailed explanation why registration and clearance are not required.

**X. Part 78 - Cable Television Relay Service**

1. The authority citation for Part 78 continues to read as follows:

**AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.**

2. Section 78.63 is amended by revising the title and the initial paragraph and deleting paragraphs (a), (b), (c), (d), and (e) to read as follows:

**§78.63 Inspection and maintenance of antenna structure marking and associated control equipment.**

The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and mainting the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each CARS licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

3. Section 78.109 is amended by adding paragraph (c) to read as follows:

**§78.109 Equipment changes.**

* * * * *

(c) Any application proposing a change in the height of the antenna structure or its location must also include the Antenna Structure Registration Number (FCC Form 854R) of the antenna upon which it proposes to locate its antenna. In the event the antenna structure does not have a Registration Number; either the owner of the antenna structure shall file FCC Form 854 ("Application for Antenna Structure Registration") in accordance with Part 17 of this chapter or the applicant shall provide a detailed explanation why registration and clearance are not required.

**XI. Part 80 - Stations in the Maritime Services**

1. The authority citation for Part 80 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.**

2. Section 80.110 is amended by revising the title and initial paragraph to read as follows:

**§ 80.110 Inspection and maintenance of antenna structure markings and associated control equipment.**

The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and mainting the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

**XII. Part 87 - Aviation Services**

1. The authority citation for Part 87 continues to read as follows:

**AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.**

2. Section 87.75 is amended by revising the title and initial paragraph to read as follows:

**§ 87.75 Maintenance of antenna structure marking and control equipment.**

The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and mainting the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

**XIII. Part 90 - Private Land Mobile Radio Services**

1. The authority citation for Part 90 continues to read as follows:

**AUTHORITY: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.**

2. Section 90.441 is amended by revising the title and initial paragraph to read as follows:

**§ 90.441 Inspection and maintenance of antenna structure marking and associated control equipment.**

The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and mainting the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

**XIV. Part 94 - Private Operational-Fixed Microwave Service**

1. The authority citation for Part 94 continues to read as follows:

**AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.**

2. Section 94.111 is amended by revising the title and initial paragraph to read as follows:

**§ 94.111 Inspection and maintenance of antenna structure marking and associated control equipment.**

The owner of each antenna structure required to be painted and/or illuminated under the provisions of Section 303(q) of the Communications Act of 1934, as amended, shall operate and mainting the antenna structure painting and lighting in accordance with Part 17 of this chapter. In the event of default by the owner, each licensee or permittee shall be individually responsible for conforming to the requirements pertaining to antenna structure painting and lighting.

**XV. Part 95 - Personal Radio Services**

1. The authority citation for Part 95 continues to read as follows:

**Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C 154, 303, unless otherwise noted.**

2. Section 95.83 is amended by adding a new paragraph (a)(3) to read as follows:

**§ 95.83 Additional information for stations with antennas higher than normally allowed.**

(a) * * *

* * * * *

(3) Register the structure by submitting FCC Form 854. The requirements for antenna struction registration, painting, and lighting are found in Part 17 of the FCC Rules.

* * * * *

**XVI. Part 97 - Amateur Radio Service**

1. The authority citation for Part 97 continues to read as follows:

**AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 201-609, unless otherwise noted.**

2. Section 97.15 is amended by revising paragraph (d) to read as follows:

**§ 97.15 Station antenna structures.**

* * * * *

(d) Further details as to whether an aeronautical study is required or if the structure must be registered, painted, or lighted are contained in Part 17 of the FCC Rules, Construction, Marking, and Lighting of Antenna Structures. To request approval to place an antenna structure higher than the limits specified in paragraphs (a), (b), and (c) of this section, the licensee must notify the FAA using FAA Form 7460-1 and the structure owner must register the structure using FCC Form 854.

* * * * *

**APPENDIX C**

**PROPOSED FORMS**

1. FCC Form 854
2. Instructions For Completion of FCC Form 854
3. FCC Form 854R

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities | **MM Docket Nos. 94-149 and 91-140** |

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: December 15, 1994; Released: January 12, 1995**

By the Commission: Commissioner Barrett issuing a statement.

**Comment Date: April 17, 1995**
**Reply Comment Date: May 17, 1995**

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## I. INTRODUCTION

1. We initiate this proceeding to explore ways to provide minorities and women with greater opportunities to enter the mass media industry, specifically including the broadcast, cable, wireless cable and low power television services[1] We invite comment as to whether we should modify existing minority-oriented mechanisms and adopt new initiatives to increase ownership of these mass media facilities by minorities and women. Our purpose in doing so is to further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity.[2]

2. It has long been the judgment of Congress that promoting minority ownership of broadcasting and cable television facilities serves to enhance the diversity of viewpoints presented on our nation's radio and television stations and cable systems. Since fiscal year 1988, Congress has included in the Commission's appropriations legislation language requiring that the Commission's minority ownership policies remain in place.[3] The courts, too, have recognized the link between minority ownership and diversity of viewpoint. For instance, the United States Court of Appeals for the District of Columbia Circuit observed in 1973 that "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news."[4] More recently, the Supreme Court determined that the nexus between minority ownership and programming diversity is "corroborated by a host of empirical evidence."[5]

3. Based on this principle, the Commission has implemented a number of policies, in addition to awarding a

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[1] "Minority" means Black, Hispanic, Native American, Alaska Native, Asian and Pacific Islander. *See* 47 C.F.R. § 73.3555(e)(3)(iv).

[2] This item incorporates in full all outstanding issues raised in the *Further Notice of Proposed Rule Making* in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992). (*Incubator Further Notice*). It also incorporates one issue raised by commenters responding to *Notice of Proposed Rule Making and Notice of Inquiry* in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992) (*Capital Formation Notice*). *See* Comments of Minority Business Investment Corporation (MBIC) in MM Docket No. 92-51. As discussed in Section III, *infra*, MBIC proposes adopting a processing guideline that presumes the *bona fides* of SBA-licensed Specialized Small Business Investment Companies. Other issues raised in that Docket will be addressed in a separate *Notice of Proposed Rule Making* adopted concurrently with this *Notice*. *See Notice of Proposed Rule Making* in MM Docket Nos. 94-150, 92-51 and 87-154, FCC 94-324 (adopted December 15, 1994) (*Attribution Notice*).

In addition, this *Notice* involves issues raised in two petitions for rulemaking and two petitions for declaratory ruling currently pending with the Commission. *See* Petition for Rule Making of the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition and the National Black Media Coalition (filed September 18, 1990); Petition of the Coalition to Improve Tax Certificate Policies (filed December 8, 1994); Petition for Declaratory Ruling Regarding Issuance of Tax Certificates, Transworld Telecommunications, Inc. and Transworld Wireless T.V. Tampa Bay, Inc. (filed January 29, 1993); Petition for Declaratory Ruling Regarding Extension of the Commission's Minority Tax Certificate Policies to Minority-Controlled Video Programmers, Nathan W. Garner and Scholastic, Inc. (filed November 18, 1994). These petitions propose, *inter alia*, that the Commission modify its minority tax certificate policy to further benefit minority owners. We will place these petitions into the record in this proceeding.

[3] *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186 (1988); Pub. L. No. 101-162, 103 Stat. 988 (1989); Pub. L. No. 101-515, 104 Stat. 2101 (1990); Pub. L. No. 102-140, 105 Stat. 782 (1991); Pub. L. No. 102-395, 106 Stat. 1828 (1992); Pub. L No. 103-121, 107 Stat. 1153 (1993); Pub. L. No. 103-317, 108 Stat. 1724 (1994).

[4] *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974) (rejecting the view that mutually exclusive applicants for broadcast construction permits should not receive comparative credit for minority ownership).

[5] *Metro Broadcasting , Inc. v. FCC*, 497 U.S. 547, 549, 580 (1990).

minority preference in comparative broadcast hearings,[6] designed to facilitate the entry of minorities into broadcasting and to otherwise promote their increased ownership of electronic mass media. In 1978, the Commission instituted its minority tax certificate and distress sale policies, both of which provide incentives to owners of broadcast and cable television properties to sell their stations to minorities.[7] As discussed below, the tax certificate policy enables the seller of a broadcast station or cable television system to defer the gain realized on that sale if the property is sold to a minority purchaser. This has been frequently utilized -- as of October 1994, the Commission had issued minority tax certificates in connection with 281 sales of AM, FM and TV stations, and in connection with 25 sales of cable systems since the inception of the tax certificate policy.[8] The distress sale policy permits a broadcast licensee whose license has been designated for a revocation hearing to sell its station, after designation for hearing but prior to commencement of the hearing, to a minority-controlled entity at 75 percent or less of the station's fair market value. To date, the distress sale policy has been invoked only rarely; Commission records indicate that 42 distress sales have been approved since the Commission adopted the distress sale policy.

4. Further, in 1985, the Commission adopted minority ownership incentives as part of its national multiple ownership rules, permitting a group owner, *i.e.*, an owner of more than one facility, to acquire attributable interests in additional stations if those stations are minority-controlled.[9] Specifically, the television ownership rules generally limit a single owner to 12 TV stations with an aggregate national audience reach no more than 25 percent. A non-minority owner may take a non-controlling interest in an additional two TV stations that are minority-controlled if the aggregate audience reach of all its stations does not exceed 30 percent.[10] A minority owner may also acquire an additional two TV stations with an aggregate audience reach of up to 30 percent, but may have a controlling interest in those stations, making for a TV minority ownership limit of 14 stations total. The national radio ownership rules, as recently modified, permit a minority owner to own and control 25 AM and 25 FM stations. They permit a non-minority owner to own and control 20 AM and 20 FM stations and hold a non-controlling interest in an additional five AM and five FM stations that are controlled by minorities or small businesses.[11]

5. While these policies have facilitated the acquisition of broadcast and cable properties by minorities, the overall representation of minorities among broadcast station or cable owners remains far below their presence in the national population and the civilian labor force. When the Commission adopted its minority tax certificate and distress sale policies in 1978, minorities comprised approximately 20 percent of the national population but controlled fewer than one percent of the 8,500 commercial radio and television stations.[12] The most recent data available show that, as of June 30, 1994, minorities represented almost 23 percent of the national workforce but control only 2.9 percent (323) of the 11,128 commercial radio and television stations on the air.[13] Similarly, of the approximately 7,500 cable operators, 0.2 percent (15) are minority-controlled.[14] Thus, despite the Commission's efforts to increase minority ownership of broadcast and cable facilities, minorities today remain significantly underrepresented among mass media owners.

6. Women have likewise traditionally been underrepresented among mass media owners. As of 1988, only 7.1 percent of broadcast stations were owned and controlled by women[15] although women represent almost 46 percent of the civilian labor force in the United States.[16] We believe that the public interest is served by increasing economic opportunities for minorities and women to own communications facilities. As we have noted in other contexts, promoting competition is an important Commission

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[6] Until recently, credit for minority ownership was awarded as a qualitative enhancement of the credit given for an applicant's proposal to "integrate" the ownership and management of a new station (*i.e.*, to have its owners work on a day-to-day basis managing the station). The Commission instituted this minority preference policy pursuant to *TV 9, supra*, which reversed a Commission decision refusing to award a broadcast applicant merit for minority ownership and participation. The minority preference policy was deemed constitutional by the Supreme Court in *Metro Broadcasting, supra*, which also upheld the Commission's distress sale policy. However, because the Commission's integration policy was invalidated last year in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), credit for minority ownership can no longer be linked to integration. The issue of how minority preferences may be awarded in comparative hearings in conformity with *Bechtel* is being addressed in a separate proceeding. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings, Second Further Notice of Proposed Rule Making* in GC Docket No. 92-52, 9 FCC Rcd 2821 (1994).

[7] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (*1978 Policy Statement*) (establishes tax certificate and distress sale policies); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982) (*1982 Policy Statement*), *proceeding terminated*, 99 F.C.C.2d 1249 (1985) (clarifies tax certificate policy and extends policy to cable television systems).

[8] Report of the Public Service Division, Office of Associate Managing Director for Public Information and Reference Services, Oct. 5, 1994.

[9] *Memorandum Opinion and Order* in Gen. Docket No. 83-1009, 100 F.C.C.2d 74 (1985). The Commission has adopted analogous provisions with respect to cable television. Section 76.503 of the Commission's rules, 47 C.F.R. § 76.503, provides that a person or entity may reach no more than 30 percent of all homes passed nationwide through cable television. The rule includes an exception whereby an individual or entity may reach an additional five percent of the nation through cable systems that are minority-controlled. *See Second Report and Order* in MM Docket No. 92-264, 8 FCC Rcd 8565, 8578 (1993), *petitions for reconsideration pending*.

[10] The additional five percent must come from the two minority-controlled stations. 47 C.F.R. § 73.3555(ε)(2).

[11] *Second Reconsideration Order* in MM Docket No. 91-140, FCC 94-267 (released November 8, 1994).

[12] *See 1978 Policy Statement, supra*, at 981.

[13] *See Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States*, The Minority Telecommunications Development Program, National Telecommunications and Information Administration, September 1994.

[14] *See* Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994.

[15] "Minority Broadcast Station Ownership and Programming: Is There a Nexus?," Congressional Research Service, July 29, 1988, at 12.

[16] *See Report* in MM Docket No. 94-34, 9 FCC Rcd 6276 (1994) (*EEO Report*).

goal.[17] This concept was espoused by Congress in 1993 when it adopted Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), authorizing the Commission to adopt competitive bidding procedures for Commission licenses for spectrum-based services. Congress specifically recognized that it is consistent with the public interest to adopt competitive bidding procedures that promote economic opportunity for a wide variety of applicants, including minorities and women.[18] Congress also directed the Commission to ensure that minorities and women are given the opportunity to participate in the provision of spectrum-based services by issuing tax certificates, adopting bidding preferences, and adopting other procedures.[19]

7. We request that commenters provide current data regarding female ownership of mass media facilities. We invite commenters to discuss whether, if we ultimately establish that women are underrepresented, each of the initiatives proposed below to promote minority ownership should also be applied to women.[20] The Commission presently has no policies designed to promote women's ownership of mass media facilities. The Commission in the past awarded female owners a preference in comparative broadcast hearings, but that policy was invalidated by the U.S. Court of Appeals for the District of Columbia in *Lamprecht v. FCC* based on its finding that the Commission had failed to show a nexus between women's ownership of broadcast stations and diversity of programming.[21] In requesting comment on whether our proposed initiatives should be applied to women, we are mindful of the court's decision in *Lamprecht*. Accordingly, we ask commenters to specifically address the extent to which female ownership contributes to diversity of programming distributed by the mass media and to provide evidence as appropriate.

8. As an alternative legal justification for providing incentives for greater ownership of mass media facilities by both minorities and women, apart from diversity of programming, we solicit comment on whether we should instead rely on an economic rationale. Specifically, we believe that women and minorities face economic disadvantages when they attempt to enter the mass media industry and that it may be appropriate to attempt to rectify such disadvantages, just as we have developed our EEO policies to encourage the hiring and promotion of women and minorities. Accordingly, we seek comment on whether prospective and existing minority or female owners encounter greater costs of capital due to higher than market rate loans, restrictive loan covenants or other restrictions, and data to support these comments. We seek information about whether, in some cases, minorities and women may lack access to capital when attempting to finance the purchase of a mass media outlet when others similarly situated would have such access, and if so, an analysis of the reasons for this condition. We seek comment on other types of disadvantages minorities and women face in acquiring mass media facilities, and data and analysis to explain why these disadvantages may be more prohibitive for minorities and women than for traditional participants in these markets. In addition, we request comment on whether other Commission policies, such as our tax certificate policy, mitigate these difficulties.

9. This *Notice* proposes specific mechanisms intended to increase minority and female ownership of mass media facilities, and solicits suggestions for other ways to further this goal. Our aim in proposing the mechanisms detailed here is to increase minority and female operators' access to capital, which has consistently been identified as a crucial barrier to entry. First, we discuss ways to refine the Commission's previous proposal to create an "incubator" program whereby existing mass media entities would be encouraged, through ownership-based incentives, to assist new entrants to the communications industry. Next, we seek comment on whether and how to modify our ownership attribution rules to increase investment in minority and female-controlled properties and further to benefit minority and female owners. We then explore ways to expand our existing tax certificate policy to encourage entities to sell their mass media holdings to minorities and women, and to make it easier for minority and female operators to upgrade their facilities. We also discuss other ideas, apart from capital enhancing proposals, that might also contribute to greater minority and female ownership of mass media facilities. Finally, we ask commenters to provide relevant data and we seek comment on whether to revise our broadcast ownership form to collect information on race, ethnicity and gender.

10. The suggestions presented here are not intended to be exhaustive; we encourage commenters to propose other ways to advance minority and female ownership of mass media outlets.[22] Moreover, we request that commenters submit recent data regarding minority and female ownership levels in broadcasting and cable as well as other media of mass communication, such as low power television and MMDS. While we include both minorities and women in the proposals outlined below, we emphasize that the legal basis for each initiative will be analyzed separately for legal sufficiency with regard to minorities and women. Commenters who believe that any or all of the proposals

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[17] *See, e.g., Notice of Proposed Rule Making and Tentative Decision* in Gen Docket No. 90-314, 7 FCC Rcd 5676, 5688 (1992) (Amendment of the Commission's Rules to Establish New Personal Communications Services); *Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700, 7709 (1993); *Second Report and Order* in Gen. Docket No. 93-252, 9 FCC Rcd 1411, 1419 (1994) (Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Commercial Mobile Radio Services); *Memorandum Opinion and Order*, Craig O. McCaw and American Telephone and Telegraph Co., Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, File Nos. ENF-93-44, 05288-CL-TC-1-93, *et al.*, 9 FCC Rcd 5836, 5844, 5861-64, 5872-73 (1994).

[18] 47 U.S.C. § 309(j)(4)(C)(ii).

[19] 47 U.S.C. § 309(j)(4)(D).

[20] We have incorporated women into the proposals presented below. This is not intended to imply that the Commission has prejudged the issue of whether women are underrepresented as owners of mass media properties. We will rely on data provided by commenters to determine whether women are indeed underrepresented.

[21] *See Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

[22] We recognize that it is often the case in the mass media industry that station or system owners were once employees of that facility or of another facility. Thus, increasing minority employment in the mass media may ultimately contribute to increased minority ownership. In our recent *EEO Report, supra* note 16, we directed the staff to determine and recommend to us the appropriate procedural vehicle for addressing comments we had received regarding modifications to our equal employment opportunity (EEO) rules. We request that parties defer EEO matters to that proceeding rather than raise them here.

detailed below should not apply to both women and minorities should identify those proposals and provide reasons why the two groups should be treated differently.

## II. PROPOSED INITIATIVES TO INCREASE ACCESS TO CAPITAL

11. In the years since the Commission and Congress began studying the issue of minority ownership, considerable evidence has been presented showing that the primary impediment to minorities seeking to enter the communications industry or to increase their mass media holdings is lack of access to capital. As we noted in the personal communications services (PCS) context, Congress explicitly recognized in the Small Business Credit and Business Opportunity Enhancement Act of 1992 that minorities have "extraordinary" difficulties in obtaining capital.[23] Evidence presented earlier this year in testimony before the House Minority Enterprise Subcommittee similarly indicates that black business borrowers have difficulty raising capital primarily because they have less equity to invest, receive fewer loan dollars per dollar of equity investment, and are less likely to have alternate loan sources such as family and friends who are in a position to lend them money.[24] Also illustrative of the problems minorities face in securing capital is a 1992 study by the Federal Reserve Bank of Boston, which reveals widespread discrimination against minority loan applicants. That study, which involved extensive discussion with lenders, underwriters and examiners, found that minority applicants are more likely to be denied mortgages even in situations where they have the same obligation ratios, credit history, loan to value and property characteristics as non-minority applicants. Specifically, the study found that a black or Hispanic applicant in the Boston area is approximately 60 percent more likely to be denied a mortgage loan than is a similarly-situated non-minority applicant.[25]

12. Moreover, in adopting previous initiatives to increase minority ownership, such as the minority tax certificate and distress sale policies, the Commission has cited lack of access to capital as a significant impediment to minorities seeking to enter the mass media industry.[26] In 1981, for example, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, which reported that financing was the "single greatest obstacle" to the entry of minorities into the telecommunications industry.[27] Commenters in the Commission's recent radio ownership proceeding also pointed out that minorities seeking to become station owners are disadvantaged above all by inadequate financing.[28]

13. It appears that the underrepresentation of women in mass media ownership is also due in important part to the difficulties women face in obtaining capital. These difficulties were recently illustrated in a study conducted by the National Foundation for Women Business Owners, which found that the removal of financial barriers would stimulate the growth of women-owned businesses.[29] For instance, the study found that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. The study also concluded that credit cards are the type of short-term financing most used by female business owners; more than half of women-owned firms use credit cards for such purposes as compared with 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study found that a greater proportion of women-owned firms turn to private sources and to a wider variety of sources than do businesses in general. In addition, a dramatic illustration of women's lack of access to capital has been provided by American Women in Radio and Television (AWRT), which reports that women-owned companies received only about one percent of the $3 billion invested by institutional venture capitalists in 1993.[30]

14. Accordingly, we request comment on how the Commission's rules and policies might be modified to increase minority and female owners' access to capital. We suggest three specific initiatives – (1) development of incubator programs; (2) modifications to the rules governing attribution of ownership interests; and (3) expansion of the Commission's minority tax certificate policy. These initiatives are designed not only to increase access to capital provided by institutional lenders, but also to encourage financial assistance to minorities and women from established participants within the broadcasting and cable industries by creating new investment incentives.

### A. Incubator Programs

15. Existing mass media operators can play an important role in helping minorities and women raise capital. Some operators, particularly large broadcast station groups or cable multiple system operators (MSOs) might be in a position to provide prospective minority and female broadcasters and cable operators with low-interest loans. Such

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[23] *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (released July 15, 1994) (*PCS Competitive Bidding Fifth Report and Order)* at para. 98 (quoting Small Business Credit and Business Opportunity Enhancement Act of 1992, 15 U.S.C. § 631 note, Pub. L. No. 102-366, 106 Stat. 986 §§ 112(4), 331(a)(4)).

[24] Testimony of Dr. Timothy Bates, Visiting Fellow, the Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

[25] Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

[26] *See, e.g., 1978 Policy Statement.* The problem is also detailed in a report issued by an advisory committee created by the Commission in 1981 to investigate financing methods and to give recommendations to the Commission on ways to encourage minority ownership of telecommunications facilities. *See* Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission, May 1982.

[27] *1982 Policy Statement,* 92 F.C.C.2d at 853.

[28] *See, e.g.,* Comments of Capital Cities/ABC, Inc., on *Notice of Proposed Rule Making* in MM Docket No. 91-140 at 23-24.

[29] The National Foundation for Women Business Owners, Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners, October 1993. *See also PCS Competitive Bidding Fifth Report and Order* at para. 102.

[30] *See* Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

group owners might also offer newcomers the industry expertise they need to obtain credit by, for example, providing management training and operational assistance.

16. In connection with its proceeding relaxing the radio multiple ownership rules, the Commission sought comment on how "incubator" programs could assist new entrants to the broadcasting industry.[31] As previously proposed, an "incubator" program referred to an arrangement whereby existing broadcasters share their talent, experience and financial resources with minorities and small businesses seeking to enter the mass media industry in exchange for regulatory concessions such as relief from certain multiple ownership restrictions. For example, a group owner that has already reached the national radio ownership limit might be permitted to own one additional station for every one minority-controlled station it "incubates." The Commission suggested that a qualified program could involve providing financial, technical and other assistance, or could involve group owners entering into joint ventures with Small Business Investment Companies (SBICs) or Specialized Small Business Investment Companies (SSBICs) that provide assistance to new entrant radio stations.[32] The Commission did not suggest a particular structure for an acceptable incubator program, but proposed that such a program would have to involve more than "simply writing a check to an SBIC or [SSBIC], or holding a single symposium."[33]

17. Commenters on the incubator proposal offered few specific suggestions.[34] They generally supported the incubator concept but suggested that we narrow our proposal to focus on minority broadcasters rather than both minorities and small businesses, arguing that including small businesses could dilute the advantages available to minorities. In addition, AWRT specifically requested that we extend the incubator program to women. We note that the Commission recently adopted PCS rules that, as required by Congress, include small businesses as well as minorities and women as "designated entities."[35] While such an approach may be appropriate for newly licensed services, we believe that it is not justified for the existing mass media services considered here. A principal goal of this proceeding is to rectify the significant underrepresentation of minorities and women in mass media ownership so as to increase programming diversity.[36] We tentatively conclude that our incubator initiative will produce the maximum benefits for minority and female operators, and thus increase diversity of viewpoint on broadcast and cable facilities, if it is limited to such underrepresented entities. As noted above, we believe the proposals made herein will increase economic opportunity for minorities and women, another important Commission goal. We seek comment on this tentative conclusion. We also seek comment on whether all minorities and women should be eligible, or whether we should adopt a net worth threshold to ensure that the benefits of an incubator program are available only to those minority and female operators who have the greatest need for capital.

18. We propose to apply the incubator approach not only to traditional television and radio broadcasting, but also to low power television, cable television, and multichannel multipoint distribution service (MMDS, or "wireless cable"). We seek comment on doing so, and on any differences we should consider with regard to these services. We also invite comment as to what steps we can take to make an incubator program effective as a means to increase minority and female ownership by assisting a minority or female individual or entity in purchasing a mass media outlet. We do not intend to deem acceptable an incubator program that does not increase minority or female ownership. For example, an incubator program designed to enable a minority FM licensee to upgrade its facility would not qualify, but a program designed to enable that licensee to purchase another station would qualify.

19. We note that to date the existing minority and small business ownership incentive in the broadcast multiple ownership rules has not been particularly effective, arguably because it does not offer the investor control of another station.[37] An incubator program, on the other hand, would enable a broadcast licensee or other entity to own and control an additional facility in return for incubating an unrelated facility (or a number of unrelated facilities). We request comment on the structure we should establish to encourage group owners to undertake the substantial effort necessary to establish a successful incubator program. In this regard, we note that NABOB, NBMC and the National Bar Association, in joint comments on our previous incubator proposal, question the efficacy of an incubator program altogether, arguing that an incubator program cannot offset the effects on minority ownership of recent increases in the radio ownership limits. They propose that if the Commission chooses to adopt rules establishing an incubator initiative, it should be structured as follows:

(1) limit the program to minorities as opposed to minorities and small businesses;

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[31] *Incubator Further Notice*, *supra*, note 2.

[32] SSBICs were formerly known as MESBICs, or Minority Enterprise Small Business Investment Companies. The Small Business Association licenses SBICs and SSBICs to act as vehicles through which it provides advisory services and venture capital in the form of equity financing and long-term loan funds to small business and minority-owned concerns. An SSBIC is a type of SBIC that makes investments solely in minority-controlled businesses.

[33] *Incubator Further Notice* at 6392.

[34] Parties filing comments on the *Incubator Further Notice* included American Women in Radio and Television (AWRT), Broadcast Capital Fund, Inc., Mid-West Family Stations, National Association of Black-Owned Broadcasters/National Black Media Coalition/National Bar Association (jointly), National Association of Broadcasters, and Paxson Enterprises, Inc.

[35] *See PCS Competitive Bidding Fifth Report and Order*, *supra*, note 18. For PCS purposes, "designated entities" include minorities, women, small businesses and rural telephone companies.

[36] In contrast, the primary aim of the Commission's radio ownership proceeding, MM Docket No. 91-140, was to invigorate the radio industry in general by permitting greater consolidation of ownership. Accordingly, the Commission in that Docket did incorporate an incentive encouraging investment in stations owned by small businesses as well as minority broadcasters.

[37] The TV incentive permits a group owner to take a non-controlling but attributable interest in an additional two TV stations if those stations are minority-controlled. The radio incentive permits a group owner to take a non-controlling but attributable interest in an additional five AM and five FM stations if those stations are controlled by minorities and small businesses. 47 C.F.R. § 73.3555(e).

(2) require that an incubating operator provide all of the elements listed in the *Further Notice* (*i.e.*, loan guarantees, direct financial assistance through loans or equity investment, management or technical assistance, training and business planning assistance);

(3) require that a successful incubator program be in place for at least a year before an incubating operator may acquire additional stations;

(4) require that an operator incubate two minority-owned facilities for every additional facility it is permitted to acquire over the ownership limits; and

(5) require that the incubating operator demonstrate that any proposed acquisition will not adversely impact minority ownership.[38]

We have incorporated requirements (1) through (4) proposed by NABOB/NBMC/NBA into our proposal, as detailed below. NABOB/NBMC/NBA does not explain how the fifth requirement would be implemented or how it would specifically contribute to the goal of increasing minority ownership. We do not propose to adopt such a limitation; to the extent commenters find NABOB/NBMC/NBA's suggestion meritorious, they should discuss how we could define an incubator program to avoid disruption of existing minority and female ownership.

20. With respect to the substance of an acceptable incubator program, we propose to require a meaningful commitment to advancing minority and/or female ownership. We therefore propose that an acceptable incubator program must include, at a minimum, three elements: (1) substantial financial assistance (*e.g.*, direct equity participation, loan guarantees or long-term low interest loans at, for example, one-half the market rate); (2) operational assistance (such as technical advice or assistance with station operations and management); and (3) training programs for new broadcasters and/or station personnel. Our intention is to establish a structure that is rigid enough to effectively assist minority and female owners and to guard against abuse, but flexible enough to let participants tailor their programs to accommodate their particular needs. Are there any other types of assistance that should be required? For example, an incubator program might also involve donation of equipment, studio space or advertising time. We seek comment on how these or other elements could be incorporated. Should any of the proposed required elements be optional? What minimum amount of financial assistance should be required in connection with an acceptable incubator program? Should we establish a specific dollar amount or require contribution of a certain percentage of the total resources needed by the incubated operator? What incentives should be provided to prospective incubating owners to maximize the effectiveness of this program?

21. In the *Incubator Further Notice*, we proposed that as an alternative to the factors mentioned above, a joint venture with an SBA-licensed SSBIC could be considered an incubator program. Is the SSBIC program an adequate substitute for the incubator requirements we propose? In addition to seeking comment on the proposed incubator program outlined above, we invite commenters to submit their own model incubator plans. Are there incentives other than the ownership-based plan discussed here that would encourage existing operators to establish incubator programs?

22. If the Commission determines that increased ownership is an adequate incentive for an incubating owner, at what point should the incubating owner be permitted to acquire additional facilities? For example, should the Commission adopt a one-year waiting period similar to that proposed by NABOB/NBMC/NBA, *i.e.*, an incubator program must have been in place for one year before the incubating entity may purchase additional facilities? Would a shorter period of time be preferable, such as six months? While a waiting period requirement may effectively forestall abuse, it could also discourage an existing owner from initiating an incubator program; a one-year or six-month wait can be significant in such a volatile industry. In the alternative, given that the purpose of an incubator program is to enable the incubated entity to purchase a facility, we could permit the incubating entity to acquire an additional facility as soon as the incubated facility is purchased and operational, subject to a one-year holding requirement on the part of the incubated owner. We seek comment on these proposals.

23. In addition, how many mass media properties should a group owner participating in such a program be permitted to acquire above the applicable ownership limit? Should a TV licensee, for example, be allowed to acquire one additional TV station for every two TV stations it incubates, as NABOB/NBMC/NBA propose? Would some other ratio be more effective, for instance one station or system for each incubated facility? Should we limit the total number of additional facilities an owner may acquire pursuant to an incubator program? Further, we believe that the assistance provided to an incubated facility will be meaningful only if the additional facilities acquired by the incubating owner are of comparable value to the incubated station. We would not permit, for example, an owner incubating an FM radio station (or stations) to acquire an additional VHF TV station. We also propose to require that the additional facilities not be significantly more valuable than the incubated facility; *e.g.*, an entity could not incubate a facility in a very small market and in return acquire a station in New York City or Los Angeles. Specifically, we propose that the facility acquired by the incubating entity must be within five markets above the incubated facility's market rank, or must be in a market ranked below the incubated facility's market. We seek comment on these proposals. What market definition should apply, *e.g.*, the Arbitron ADI markets for television? A parallel formulation would also be needed in the cable television context so that the additional facilities or "households" passed in excess of what is ordinarily permitted by the rules[39] has comparable size or value in relationship to the incubated facility. We ask commenters to submit suggestions in this regard.

24. Further, should broadcasters participating in the incubator program be allowed to exceed both the national and local multiple ownership limits? Unlike the national ownership limits for radio and television, the local ownership rules do not currently include a separate ownership cap for minorities. As we have discussed in other contexts,

[38] NABOB/NBMC/NBA Comments at 5-6.
[39] See note 9, *supra*.

the threat of undue concentration may arise at the local level, particularly in small, less diverse markets.[40] Commenters who support extending the incubator program to permit incubating owners to acquire an additional station locally should discuss whether the Commission should be less permissive in considering waivers to the radio and TV duopoly rules or the one-to-a-market rule than to the national ownership rules. In the same vein, should facilities in small, concentrated markets be treated differently than in large, diverse markets? If so, what should be the threshold (*e.g.*, may acquire an additional facility in the top 25 television markets with at least 30 other voices)?[41]

**B. Attribution Rules**

25.The Commission's broadcast attribution rules, set forth in the notes to 47 C.F.R. § 73.3555, are used to determine whether particular media holdings will be considered ownership interests for purposes of applying the Commission's multiple ownership rules.[42] Parallel provisions appear in the cable television rules, 47 C.F.R. § 76.501. In general, any interest that represents five percent or more of the outstanding voting stock of a company is an attributable ownership interest and thus is counted in determining compliance with the multiple ownership limits. Passive investors may hold up to 10 percent of a company's voting stock without attribution.[43] Non-voting stock interests, including most preferred classes of stock, generally are not considered attributable. In addition, limited partnership interests are not deemed attributable if the licensee certifies that the limited partner is not materially involved in the management or operation of the media-related activities of the partnership.[44]

26. We now seek comment on whether, and in what manner, we should modify our mass media attribution rules to help minority and female-owned businesses raise capital. If commenters believe that relaxing our attribution rules would in fact stimulate investment in minority-owned mass media facilities, we ask that they make specific suggestions as to how the rules might be restructured and how the proposed changes would facilitate capital availability. We believe, for example, that one of the options made available to "designated entities" bidding for PCS licenses[45] could be adapted as follows: If a minority or female individual or entity or group of individuals or entities holds more than 50 percent of the voting stock of a corporate broadcast licensee or other mass media entity, with at least 15 percent of the company's equity, then no other interests in that entity will be attributable.[46] We seek comment on whether we should relax our attribution rules in this manner, and also solicit alternative suggestions. Should the rule apply locally as well as nationally? In other words, would the capital-enhancing. benefits of such a rule be significant enough to outweigh concerns about potential concentration of ownership in local markets? Should any such attribution rule change be limited to large markets with a specified number of outlets and independent voices? Alternatively, should this attribution rule only be operative at the national level, so that an owner would not be permitted to hold 49 percent of two minority or female-controlled entities in the same local area? The above rule, as proposed, would permit an investor to hold 49.9 percent of the voting stock in an unlimited number of minority or female-controlled entities. Should there be a numerical limit on the number of interests in minority or female-controlled stations that would, under this exception, be considered not attributable to the investor?

27. This proposed rule would require that the minority or female owner or owners actually control the licensee. How should control be determined? A licensee might, for example, have a "control group" of six minority owners who each hold 10 percent of the voting stock. Because they would collectively hold more than 50 percent of the voting stock, under the suggested rule no other interests would be attributable. It would violate the intent of the suggested rule, however, if a non-minority shareholder who held 30 or 40 percent of the licensee had the ability to exercise control. Thus, we propose to require, as a safeguard against misuse, that each licensee wishing to qualify for the benefits of the rule certify on its application for transfer, assignment or renewal that investors taking advantage of this exception (*i.e.*, non-minority or male investors holding shares above the applicable attribution benchmark who seek to have their interests deemed non-attributable) do not exercise control over the day-to-day operations of the

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[40] *See, e.g., Second Memorandum Opinion and Order* in MM Docket No. 91-140, FCC 94-267 (released Nov. 8, 1994).

[41] In a *Further Notice of Proposed Rulemaking*, adopted concurrently with this *Notice*, the Commission seeks further comment on modification of the TV duopoly rule (47 C.F.R. § 73.3555(b)) and the one-to-a-market rule (47 C.F.R. § 73.3555(c)). *See Further Notice of Proposed Rule Making* in MM Docket No. 91-221, FCC 94-322 (adopted Dec. 15, 1994) (*TV Further Notice*).

[42] Concurrently with this proceeding, we are initiating a proceeding to review the Commission's rules regarding attribution of ownership in general. *See Attribution Notice*, *supra* note 2.

[43] Three types of entities are considered passive investors: (1) investment companies; (2) insurance companies; and (3) bank trust departments. *See* 47 C.F.R. § 73.3555, Note 2(c).

[44] Adequate insulation from the media-related activities of the partnership is determined with reference to the specific insulation criteria delineated in *Attribution Reconsideration Order*, 58 RR 2d 604 (1985).

[45] The PCS rules have special attribution provisions regarding bidding preferences for "designated entities," including, *inter alia*, minority and female-owned businesses. Pursuant to those rules, if a designated entity control group owns at least 50.1 percent of the voting stock of an applicant, and at least 50.1 percent of the equity, other investors' interests are not deemed attributable unless such investors own more than 49.9 percent of the entity's passive equity. In the alternative, if a designated entity control group owns at least 50.1 percent of the voting stock and at least 25 percent of the equity, other interests are not attributable unless such investors own more than 25 percent of the passive equity. Passive equity is defined to include limited partnership interests, non-voting stock, and, in the case of corporations, 25 percent or less of the voting stock. A designated entity control group must be controlled by a qualifying designated entity but may include other interests as well. Thus, while the designated entity must hold at least 25 percent equity, only 15 percent of that equity must come from the qualifying designated entity participants, and up to 10 percent may come from other sources. *See Fifth Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-285 (released November 23, 1994).

[46] Subject to the outcome of the attribution proceeding being initiated today, we would not intend by adopting a 15 percent equity requirement to alter our single majority shareholder rule. *See* 47 C.F.R. § 73.3555, Note 2(b).

broadcast station. We seek comment on whether such a certification, in combination with the 15 percent equity benchmark, would operate as sufficient safeguards. Are there alternative ways to ensure that the minority or female "control group" is actually in control?

### C. Tax Certificates

28. Exercising the authority conferred upon it by Section 1071 of the Internal Revenue Code, 26 U.S.C. § 1071, the Commission has, since 1978, issued tax certificates to promote minority ownership of broadcast stations.[47] Under the current policy, such tax certificates are awarded to encourage both the sale of facilities to minority purchasers and the investment of start-up capital in minority entities. Thus, tax certificates are available to (1) individuals and entities that sell a broadcast station or cable system to a minority-controlled purchaser and (2) equity holders in a minority-controlled broadcasting or cable entity upon the sale of their equity, provided that their interest assisted in financing the acquisition of a broadcast or cable property or was purchased within the first year after broadcast license issuance, thus contributing to the stabilization of the entity's capital base. In either case, the tax certificate enables the seller to defer for two years the gain realized by (1) treating it as an involuntary conversion, under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property, under 26 U.S.C. § 1071, or both.[48]

29. The tax certificate policy has been the most frequently used of the Commission's minority ownership policies. Over the past several years, a number of parties have suggested that the policy could be of even greater benefit to minority owners if the Commission and the Internal Revenue Service set up a working group to change certain IRS rules regarding tax certificates.[49] They proposed, for example, that we ask the IRS to revisit its 1966 ruling that requires a holder of a tax certificate to reinvest the proceeds of a sale in a corporation that directly operates a communications business, as opposed to a holding company. They also proposed that we ask the IRS to revisit revenue rulings holding that the purchase of interests in a partnership does not qualify as replacement property. In addition, they urge us to ask the IRS to increase the deferral period from two years to at least four years. Another suggestion that has come up in informal discussions with minority mass media operators is that we seek to expand the definition of suitable reinvestment property for a mass media seller to include any communications business. The suggested rule change would, for instance, permit a cable operator to sell his or her system to a minority and reinvest the proceeds in a PCS entity or telephone company. We seek comment on these proposals and invite commenters to suggest other ways the tax certificate policy could be used to further the goals set out herein.

30. Further, we seek comment on whether extension of our tax certificate policies could spur additional investment in communications outlets. For example, it has been suggested that the Commission might extend the tax certificate policy by issuing certificates to investors that provide start-up capital for minority-controlled cable programmers, particularly educational programmers, who later sell their shares.[50] Similarly, should the Commission grant tax certificates to minority MMDS operators or minority video programmers?[51]

31. We also ask whether we should issue a tax certificate to a minority operator that sells its facility to a non-minority buyer if the minority seller uses the proceeds to invest in a controlling interest in a more valuable mass media property.[52] We have declined to adopt this approach in the past because we were concerned that such a transaction would result in a net decrease in minority ownership during the two-year deferral period.[53] On the other hand, this extension of the tax certificate policy might ultimately enable minority-owned stations to become more competitive. We ask commenters to address these competing considerations. A possible compromise approach would be to issue a tax certificate for minority owners seeking to acquire a more valuable property if the minority seller can provide evidence that it is prepared to purchase the more valuable facility within a reasonable period of time. Commenters espousing this approach should address what would constitute "a reasonable period of time." Further, what guidelines should govern valuation of the properties involved? We also seek comment on whether extension of our tax certificate policies to the entities described in this paragraph and the previous paragraph are permissible under Section 1071 of the Internal Revenue Code.

32. Commenters are also requested to discuss how the tax certificate policy could be modified to increase female ownership of mass media facilities. Should we treat minor-

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[47] Under Section 1071, the Commission may issue a tax certificate that permits sellers of broadcast properties to defer capital gains taxation on a sale or exchange of property whenever it determines that such a sale or exchange is "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations. . . ." 26 U.S.C. § 1071.

[48] *See 1978 Policy Statement*, 68 F.C.C.2d 979; *1982 Policy Statement*, 92 F.C.C.2d 849.

[49] *See* Petition for Rule Making of the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition and the National Black Media Coalition, filed Sept. 18, 1990. A similar petition was filed by the Coalition to Improve Tax Certificate Policies on December 8, 1994. (An earlier petition filed by the Coalition to Improve Tax Certificate Policies was withdrawn by letter dated December 8, 1994.) We incorporate the NAACP/LULAC/ NHMC/NBMC Petition and the Coalition to Improve Tax Certificate Policies Petition by reference into this proceeding.

[50] *See* Petition for Declaratory Ruling Regarding Extension of the Commission's Minority Tax Certificate Policies to Minority-Controlled Video Programmers, Nathan W. Garner and Scholastic, Inc. (filed November 18, 1994), which will be included in the record of this proceeding. By raising this issue here, we do not intend to foreclose the possibility that the Commission might interpret existing policy as broad enough to cover some of the matters discussed herein.

[51] *See* Petition for Declaratory Ruling Regarding Issuance of Tax Certificates, Transworld Telecommunications, Inc. and Transworld Wireless T.V. Tampa Bay, Inc. (filed January 29, 1993), which will be included in the record of this proceeding.

[52] Of course, if the minority broadcaster or cable system owner sells its station or system to another minority broadcaster, it would be eligible for a tax certificate under the current policy.

[53] *See Letter to R. Clark Wadlow, Esq.*, 4 FCC Rcd 5262 (1989).

ity and female operators alike, or are there aspects of the tax certificate policy that would not apply equally to both groups?

## III. OTHER INITIATIVES TO FACILITATE MINORITY AND FEMALE OWNERSHIP OF MASS MEDIA FACILITIES

33. *Investment Tax Credit.* It has been informally suggested that we propose legislation permitting a current year credit for investors in minority-controlled communications corporations. As noted previously, a tax certificate is available for start-up investors in minority-controlled mass media companies when they sell their interests. A current-year credit would afford such start-up investors a tax benefit without requiring that they sell their interests. It would also provide a more immediate investment incentive in that the tax benefit would be available to the investor for the tax year that the investment is made. Thus, an investment tax credit might be another way to help minority and female owners raise capital. Should we consider proposing legislative action in this regard? If so, what is the minimum investment that should qualify; would 20 percent be an appropriate threshold? How should the credit operate, *e.g.*, should an investor receive a credit for 100 percent of the amount he or she invests?

34. *Application standards.* In its comments in MM Docket No. 92-51, the Minority Broadcast Investment Corporation (MBIC) urged the Commission to take steps to streamline the broadcast application process for applicants funded by SSBICs.[54] MBIC proposed that certain application processing standards not be applied to applicants receiving their financing from SSBICs, specifically: (1) the practice of permitting competitors of minority applicants in comparative hearings to allege that the minority applicant is actually a front for non-minority investors; and (2) the practice of permitting competitors to claim that the language of a financial letter does not really offer the financing stated but is merely an accommodation to the applicant. We seek comment on whether we should establish a rebuttable presumption for a broadcast applicant financed by an SBA-licensed SSBIC that (1) it is not acting as a front for non-minority investors and (2) the representations in its financial letter regarding financing provided by an SSBIC are accurate. We believe that this presumption could make the application process less expensive and less time-consuming for eligible applicants. Would the current rules regarding SSBIC licensing provide adequate safeguards to deter misuse of such a presumption?

35. *Ownership limits.* Minority and female owners may also benefit from allowing higher local radio ownership limits similar to the national minority ownership caps for radio.[55] In our most recent radio ownership proceeding, we revised our local radio ownership limits to permit a single owner to acquire up to two AM and two FM stations in markets with at least 15 stations, subject to a combined audience share limitation of 25 percent.[56] In so doing, we concluded that increased consolidation of ownership permits broadcasters to "combine administrative, sales, programming, promotion, production and other functions as well as to share studio space and equipment."[57] Consolidation can be especially useful at the local level due to the physical proximity of the stations involved. We believe that permitting greater local consolidation among minority and female owners of radio stations will enable them to more effectively compete with large, group-owned stations.

36. We note that minority broadcasters' initial entry in the industry is often achieved through acquisition of less costly stations, generally AM stations or Class A FM stations.[58] We therefore propose to permit a minority-controlled entity to own up to three AM stations of any type and up to three Class A FM stations in markets with at least 15 stations, subject to a combined audience share limitation of 30 percent.[59] We seek; comment on this proposal and on any other proposals that would enhance minority and female ownership at the local level. We specifically ask for comment on whether we should adopt a national ownership cap for women similar to our national TV and radio ownership caps for minorities, or any other parallel proposal.

37. We are not inclined to propose permitting greater consolidation in smaller radio markets due to concerns about undue concentration of ownership. The same concerns persuade us not to propose a separate local ownership cap for TV, given that there are far fewer television stations than radio stations.[60] Further, we believe that an increase in the local radio ownership limits may be of more immediate benefit to minority and female broadcasters, who are more likely to own radio stations than more expensive full-power television stations.

38. We do believe, however, that further consolidation of TV station ownership at the national level would not necessarily harm competition in the industry nor pose a threat to diversity of viewpoint. The national TV ownership rules currently permit a minority owner to own 14 TV stations -- two stations in excess of the general national TV ownership limits -- with a combined audience reach of 30 percent or less.[61] In a *Further Notice* adopted concurrently with this *Notice*, we seek comment on whether we should raise the

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[54] Other issues raised in MM Docket No. 92-51 are addressed in our *Attribution Notice*, *supra*, note 2, which was adopted concurrently with this *Notice*.

[55] As noted previously, the national radio ownership rules permit a minority owner to own 25 AM and 25 FM stations -- five AM and five FM stations in excess of the general national radio ownership limits. *Second Reconsideration Order* in MM Docket No. 91-140, FCC 94-267 (released Nov. 8, 1994).

[56] *See* 47 C.F.R. § 73.3555(a); *Memorandum Opinion and Order* in MM Docket No. 91-140, 7 FCC Rcd 6385 (1992), *reconsideration granted in part*, FCC 94-267 (released Nov. 8, 1994).

[57] *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6388 (1992).

[58] Class A FM stations are the lowest-powered type of FM stations, with a minimum effective radiated power (ERP) of 0.1 kilowatts. By way of comparison, full-power Class C FM stations must operate with a minimum ERP of 100 kilowatts. *See* 47 C.F.R. § 73.211.

[59] For purposes of the local radio ownership rules, a "market" is defined with reference to the principal community contours of the stations involved in a transaction. *See Memorandum Opinion and Order* in MM Docket No. 91-140, 7 FCC Rcdh 6387, 6395 (1992).

[60] As of October 31, 1994, there were 10,004 commercial radio stations and 1,158 commercial television stations licensed by the Commission. *See* FCC News Release, Broadcast Station Totals as of October 31, 1994, Mimeo No. 50616, November 10, 1994.

[61] 47 C.F.R. § 73.3555(e).

national ownership limits for TV.[62] Keeping that proceeding in mind, how should we modify the national TV ownership caps to provide additional incentives for minority and female ownership?

## V. DATA COLLECTION

39. To help us assess the continued effectiveness of FCC minority and female ownership initiatives, we intend to develop more precise information on minority and female ownership of mass media facilities. In this regard, we seek comment on whether to revise our Annual Ownership Report form, FCC Form 323, to include a section requiring owners to identify their race or ethnicity and their gender. In addition, we note that minority broadcasters have argued that minority representation in the broadcasting industry may be reduced as a result of the Commission's recent relaxation of the radio duopoly rule.[63] We accordingly ask commenters to submit relevant data regarding any apparent impact that increased consolidation of facilities resulting from relaxation of our multiple ownership rules has had on minority and female owners, including the impact of local marketing agreements (LMAs) between stations.

## VI. CONCLUSION

40. With this proceeding, we intend to explore meaningful mechanisms for promoting minority and female ownership of mass media facilities by increasing economic opportunities for minorities and women. We also believe these policies will increase the diversity of programming disseminated to the public. By taking action now, prior to the advent of sweeping changes anticipated in the communications industry, we attempt to ensure that all segments of society will be poised to participate in the communications industry. Thus, we request that parties commenting on the proposals advanced in this *Notice* keep in mind the current and predicted composition of the mass media marketplace. Some of the proposed initiatives attempt to tailor policies and rules adopted in the past for use in the 21st century. Others propose entirely new avenues for bringing more minority and female owners into the industry. We do not expect the suggestions presented in this *Notice* to be all-inclusive, however, and we welcome any additional ideas commenters may have for increasing minority and female ownership.

## VII. ADMINISTRATIVE MATTERS

41. *Ex Parte Rules -- Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. *See* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

42. *Comment Information.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before April 17, 1995, and reply comments on or before May 17, 1995. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

43. *Initial Regulatory Flexibility Analysis.* See Appendix.

44. *Additional Information.* For additional information regarding this proceeding, contact Jane Hinckley Halprin or Diane Conley, Mass Media Bureau, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX
### Initial Regulatory Flexibility Analysis

**I. Reason for the Action:** This proceeding was initiated to explore ways to increase minority and female ownership of broadcasting facilities.

**II. Objective of this Action:** The actions proposed in the *Notice* are intended to facilitate minority and female entry into mass media services, and are particularly aimed at increasing those groups' access to capital.

**III. Legal Basis:** Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303.

**IV. Reporting, Recordkeeping and Other Compliance Requirements Inherent in the Proposed Rule:** The *Notice* seeks comment as to whether to add to the Commission's annual ownership report form a section in which owners would disclose their gender and their race or ethnicity.

**V. Federal Rules Which Overlap, Duplicate or Conflict with the Proposed Rule:** None.

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[62] *TV Further Notice, supra* note 41.

[63] *See, e.g.,* Petitions for Reconsideration of *Report and Order* in MM Docket No. 91-140 filed by LULAC, NABOB, TRAC; Petition for Reconsideration of *Memorandum Opinion and Order* in MM Docket No. 91-140 filed by LULAC, NABOB/NBMC.

**VI. Description, Potential Impact and Number of Small Entities Involved:** Approximately 11,000 existing television and radio broadcasters, approximately 11,000 cable television operators and approximately 150 MMDS operators of all sizes may be affected by the proposals contained in this decision.

**VII. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** The proposals contained in this *Notice* do not impose additional burdens on small entities.

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice,* but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981)).

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

**Re: Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities (MM Docket No. 91-140)**

Today, we have adopted a Notice of Proposed Rulemaking that seeks comment on initiatives aimed at increasing minority and female ownership of mass media facilities. I am pleased that the Commission has determined to undertake a thorough examination of the impact on minority ownership that have resulted from today's capital and regulatory environments.

There is little doubt that minorities, and potentially women[1], are underrepresented as owners of broadcast stations in the United States.[2] I continue to have concerns about the potential for harm to the concept of diversity that could arise from the modification of our rules relating national ownership limits and attribution benchmarks for television stations. Yet, as this NPRM indicates, the problem is systemic and is rooted, in large part, in the historical barriers to capital formation for minorities. I am pleased that we are undertaking a comprehensive review of the Commission's rules, particularly with respect to local marketing agreements and duopolies, that seeks data about their impact on minority ownership. Further, I will be very interested in reviewing the comments about proposals for increasing minority ownership of mass media facilities.

Finally, I am in agreement with the companion Notice[3] in this television ownership proceeding which seeks comment of the potential advantages of increasing passive ownership limits in television stations and new business forms such as limited liability corporations. I believe that the proposed modification of passive ownership limits as well as the utilization of

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[1]Bear in mind that the Notice seeks evidence that women are underrepresented as owners of mass media facilities. Therefore, I do not wish to prejudge the issue before the data is collected on this subject.

[2]The percentage of commercial broadcast stations owned by minorities only increased from 2.7% in 1993 to 2.9% as of September 1994. See, "Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States", The Minority Telecommunications Development Program, National Telecommunications and Information Administration, United States Department of Commerce, September 1994.

[3]See, In the Matter of Review of the Commission's Regulations Governing Attribution of Mass Media Interests (Notice of Proposed Rulemaking) (MM Docket Nos. 87-154 and 92-51).

alternative business forms may ultimately provide increased financing opportunities for new entrants, including minorities and women. In this regard, I look forward to reviewing the comments that are submitted in response to today's Notices for these television and minority ownership proceedings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 21, 1995**

## PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S SUPPLEMENTAL INFORMATION TO ITS SECTION 214 APPLICATIONS

**FILE NOS. W-P-C-6912 and 6966**

On February 16, 1995, Bell Atlantic filed a letter providing supplemental information on its Section 214 applications to construct, own, and operate facilities to provide video dialtone service in the Washington, D.C. LATA (W-P-C-6912) and in Baltimore, Northern New Jersey, Philadelphia, Delaware, and Southeast Virginia (W-P-C-6966). The application for the Washington, D.C. LATA was initially filed on December 16, 1993, and the application for the other areas was initially filed on June 16, 1994.

Interested parties are invited to file comments on the supplemental filing only. Comments should be filed by **March 7, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the supplemental filing can be obtained from ITS at (202) 857-3800. The supplemental filing is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 7, 1995**

**PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC'S PETITION FOR WAIVER OF THE COMMISSION'S ACCESS TIME STANDARDS FOR 800 DATA BASE SERVICE**

**CC DOCKET NO. 86-10**

On December 21, 1994, Pacific Bell (Pacific) filed a petition for waiver of the access time standards established in the Commission's *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking*, CC Docket No. 86-10, 6 FCC Rcd 5421 (1991). Pursuant to these standards, the Bell Operating Companies and GTE Telephone Companies are required to reduce access times to five seconds or less for all of their 800 data base traffic by March 1, 1995.

According to Pacific, it has two customers with new product offerings that require routing over Switched 56 trunk groups of calls originated on ISDN or Switched 56 facilities and placed to 800 numbers. Pacific states that use of the Switched 56 network will result in access times of approximately 7-10 seconds. Pacific states that it is in the process of deploying a 64 Clear Channel Capability (CCC) transport network that will provide access times of 5 seconds or less. Pacific states, however, that the 64 CCC deployment will not be completed until December 31, 1995. Pacific requests a waiver of the five-second access time standard until March 1, 1996, to allow it to complete deployment of the 64 CCC network and provision and implement initial customer orders for applications on the new network. Pacific adds that only a very small percentage of 800 calls will be affected by the waiver.

Interested parties should file comments on Pacific's waiver petition by **February 17, 1995**, and reply comments by **February 24, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the waiver request can be obtained from ITS at (202) 857-3800. We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 7, 1995

## PLEADING CYCLE ESTABLISHED FOR COMMENTS ON SNET'S MOTION FOR EXTENSION OF ITS TRIAL OF VIDEO DIALTONE SERVICE

FILE NO. W-P-C-6858

On January 31, 1995, the Southern New England Telephone Company (SNET) filed a motion for a one-year extension of its Section 214 authorization to provide a trial of video dialtone service in its West Hartford service area. The Commission initially granted SNET authorization to conduct a limited trial in West Hartford for one year.

The Commission subsequently authorized SNET to expand its video dialtone trial to include additional communities in its service area. (*See Order and Authorization*, W-P-C-6858, 9 FCC Rcd 7715 (1994) (*Expanded Trial Order*.) In that decision, the Commission determined that for regulatory purposes the West Hartford trial began on April 1, 1994.

SNET requests an extension of the West Hartford trial so as to synchronize it with the expanded trial for regulatory purposes. SNET projects that the official start of the expanded trial would likely be in early June 1995. SNET also states that an extension of the West Hartford trial would allow SNET to test the implementation of digital equipment in West Hartford.

Interested parties are invited to file comments or reply comments on the motion. Comments should be filed by **February 22, 1995**, and reply comments should be filed by **March 3, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the motion can be obtained from ITS at (202) 857-3800. The motion is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30 -12:30 and 1:30 -3:00 , Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN CABLE TELEVISION, INC.
(d/b/a DIMENSION CABLE SERVICES)

Petition for Revocation

of Certification of
Mohave County, Arizona,
Board of Supervisors to Regulate
Basic Cable Service Rates
FCC Community ID Nos. (AZ0051 &
AZ0164)

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 7, 1995; Released: February 8, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On February 4, 1994, American Cable Television, Inc., d/b/a Dimension Cable Services ("Dimension") filed a petition challenging the certification of Mohave County, Arizona Board of Supervisors ("Mohave County") to regulate rates for the basic cable service and associated equipment.[1] In addition, Dimension submitted a supplement to its petition containing supporting documentation pursuant to a recent Commission Order.[2] Dimension later filed a response to the Bureau's requests for clarifying information.[3] Mohave County did not file an opposition to Dimension's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to such effective competition as defined by the Communications Act of 1934.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition unless they have actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition as defined by the Communications Act of 1934.[8]

## II. DISCUSSION

### Petitioner's Contentions

3. Dimension alleges that it meets two of the three alternative tests for demonstrating the presence of effective competition in the franchise area.[9] First, Dimension argues that it meets the competing provider test for effective com-

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[1] Dimension filed a pleading styled as a "petition for reconsideration" on February 4, 1994. Mohave County's certification, however, became effective on November 19, 1993. Any petition for reconsideration challenging Mohave County's certification must have been filed no later than December 19, 1993. *See* 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*). Dimension's petition, thus, was filed almost two months after the deadline for filing a petition for reconsideration had elapsed. Accordingly, we will treat Dimension's pleading as a "petition for revocation."

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Telephone request from Susan German to Christopher J. Harvie, Attorney for Dimension (November 21, 1994), and letter from Daren A. Benzi to Frank W. Lloyd, Attorney for Dimension (December 16, 1994).

[4] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[8] 47 C.F.R. § 76.911(c).

[9] If the Commission finds that a cable system is subject to effective competition, the rates for that system shall not be subject to regulation. Communications Act of 1934 §623 (a)(2), 47 U.S.C. §543(a)(2); *See also* Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A) (under the low penetration test, cable operators are deemed subject to effective competition if "fewer that 30 percent of the households in the franchise area subscribe to the cable service of a cable system."); Communications Act of 1934 §623(l)(1)(B), 47 C.F.R. §543(l)(1)(B) (under the competing provider test, cable operators are deemed subject to effective competition if "the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area."); Communications Act of 1934 §623(l)(1)(C), 47 U.S.C. §543(l)(1)(C) (under the municipal provider test, cable operators are deemed subject to effective competition if "a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.").

petition.[10] Alternatively, Dimension argues that its cable system serving certain unincorporated areas of Mohave County, its franchise area, serves fewer than 30 percent of the households in the franchise area.[11]

4. With respect to the low penetration test, Dimension argues that it serves 898 of the 5,075 households (that is, occupied housing units),[12] or 18 percent of the total number of households in its franchise area. Dimension states that there are 7,049 "homes" in its Mohave County franchise area. Dimension states that its number of "homes" is based on a hand-count of housing units within its franchise area.[13] To estimate the number of households (that is, occupied housing units), Dimension applied a 72 percent occupancy rate obtained from an official with the Western Arizona Council of Governments.[14] This calculation yielded an estimate of 5,075 households (or occupied housing units) within Dimension's franchise area. As supporting documentation, Dimension submits a copy of a computer printout with sufficient subscriber information to support its claim that it serves 898 subscribers in the franchise area. In addition, Dimension submits a copy of its franchise agreement and a map depicting its franchise area.

**Disposition of Dimension's Effective Competition Claims**

5. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[16] Based on the evidence presented, we find that Dimension has met this burden. Dimension has appropriately relied on data reflecting the number of households as required by our rules.[17] Relying on this data, Dimension has submitted sufficient evidence demonstrating that its cable system serves fewer than 30 percent of the households in its franchise area. Thus, we find that Dimension's system serving certain unincorporated areas of Mohave County is subject to effective competition under the low penetration test.

6. We are unable to determine whether Dimension is subject to effective competition under the competing provider test. Dimension argues that it faces competition from Americable International which is also authorized to provide service in portions of Mohave County. In support of its assertions, Dimension relies on households passed and households served data contained in Americable's supplement to petition for reconsideration of Mohave County's certification.[18] However, in that case we found the number of households passed by Americable to be unreliable.[19] Therefore, we are unable to consider those figures with respect to Dimension's petition.

## III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by American Cable Television Inc., d/b/a/ Dimension Cable Services challenging the certification of Mohave County, Arizona to regulate basic cable rates IS GRANTED.

8. IT IS FURTHER ORDERED that the certification of Mohave County to regulate Dimension's basic cable service rates IS RESCINDED.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] *See* n.9, *supra*.

[11] The Commission's low penetration effective competition test provides that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1).

[12] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[13] Dimension states that it is unable to provide 1990 Census data because the Census does not provide any household numbers for the unincorporated areas which compose Dimension's franchise area.

[14] According to Dimension, the 72% occupancy rate was formulated based on data provided in the 1990 Census. Dimension does not describe how the number was calculated. However, we find that Dimension's method is acceptable under the circumstances, in which there is a lack of Census household numbers for Dimension's franchise area and the occupancy rate has been obtained from a quasi-governmental entity or other official source.

[15] 47 C.F.R. §76.906.

[16] 47 C.F.R. §76.911(b)(1).

[17] *Third Order on Reconsideration*, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).

[18] Americable Supplement to Petition for Reconsideration, August 19, 1994. *See also* Americable Supplement to Petition for Reconsideration, August 22, 1994 (Americable submitted a computer print-out that was not legible in its initial supplement).

[19] *See Americable International Arizona, Inc.*, DA 95-176 (released February 8,1995). In addition, we note that Dimension's reliance on Americable's numbers would not provide the necessary data for our analysis because of the differences in the franchise areas. Although Dimension seems to suggest that Americable serves the same franchise area as Dimension, the Mohave County Board of Supervisors submits evidence to the contrary. *See* Letter to Daren A. Benzi, from David J. Grisez, County Manager (December 20, 1994) (neither of the franchise areas are exactly the same, and in the Mohave Valley area the Americable franchise area falls entirely within the boundaries of Dimension's franchised area).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICABLE INTERNATIONAL
ARIZONA INC.,

Petition for Reconsideration

of Certification of
Mohave County, Arizona,
Board of Supervisors to Regulate
Basic Cable Service Rates
FCC Community ID No. (AZ0295)

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 7, 1995; Released: February 8, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On December 20, 1994 Americable International Arizona, Inc., ("Americable") filed a petition for reconsideration challenging the certification of the Mohave County Arizona Board of Supervisors ("the County") to regulate Americable's rates for basic cable service and associated equipment.[1] In addition, Americable submitted a supplement to its petition containing supporting documentation pursuant to a recent Commission Order.[2] In addition, Americable later filed a response to the Bureau's request for clarifying information.[3] Mohave County did not file an opposition to Americable petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition as defined by the Communications Act of 1934.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition unless they have actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition as defined by the Communications Act of 1934.[8]

## II. DISCUSSION

### Petitioner's Contentions

3. Americable bases its challenge on the competing provider testPfor effective competition set forth in the 1992 Cable Act and our rules.[9] This test requires Americable to show that its system serving certain unincorporated areas of Mohave County, its franchise area, is subject to effective competition because its franchise area is: 1) served by itself and American Cable Television d/b/a Dimension Cable Services ("Dimension"), an unaffiliated multichannel video programming distributor ("MVPD") each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to the programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area. As an alternative, Americable states that it meets the low penetration effective competition test because it serves fewer than 30 per cent of the "households" in its franchise area.[10]

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[1] The County filed its Certification of Franchising Authority to Regulate Basic Cable Services Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 20, 1993. The certification became effective on November 19, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Letter from Daren A. Benzi to Susan R. Athari, Attorney for Americable (December 16, 1994).

[4] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[8] 47 C.F.R. § 76.911(c).

[9] The 1992 Cable Act (Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 § 623(1)(1)(B), 47 U.S.C. §543(1)(1)(B); 47 C.F.R. §76.905(b)(2)(i) and (ii).

[10] Another one of the bases upon which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

4. Americable states that there are a total of 5,478 "households" (that is, occupied housing units) in its Fort Mohave franchise area.[11] Americable calculates its household data by dividing its franchise area into northern and southern portions. In order to calculate the number of households in the southern portion, Americable relies upon 1990 Census data reflecting "occupied housing units" for the southern portion of its Fort Mohave franchise area (i.e. Mohave Valley and Willow Valley).[12] According to that data there are 2,549 occupied housing units in Mohave Valley and 190 occupied housing units in Willow Valley for a total of 2,739 occupied housing units in the southern portion of the franchise area. In order to determine the number of households in the northern portion of the franchise area, Americable attempts to estimate the number of households by assuming that it offers to serve an equal distribution of households in both the northern and southern portions of its franchise area. Thus, Americable assumes that the northern portion of the franchise area has the same number of households as are located in the southern portion.[13] Based on these assumptions, Americable estimates that its franchise area consists of 5,478 occupied housing units (i.e. 2,739 for the southern portion and 2,739 for the northern portion). Census data is not available for the northern portion of the franchise area.

5. Americable states that it offers to serve approximately 84.5 per cent, or 4,629 of the estimated total number of households in its franchise area. In addition, Americable claims that it actually serves 23.7 per cent, or 1,298 of the estimated total number of households in the franchise area. As supporting documentation Americable provides a computer printout which illustrates the number of "homes" passed and the number of subscribers served by Americable Mohave County system.[14] Americable also provides maps of the franchise area, and a copy of the franchise agreement for the Fort Mohave area. In addition, Americable submits a copy of its channel line-up which indicates that Americable offers a total of 59 channels, including more than 30 non-broadcast channels.

6. With respect to Dimension, Americable's asserted competitor in its Fort Mohave franchise area, Amerciable states that Dimension passes 71.1 per cent, or 3,894 of the estimated total number of households in Americable's franchise area.[15] In addition, Americable states that Dimension serves 23.3 per cent, or 1,276 of the estimated total number of households in Americable's franchise area. As supporting documentation, Americable refers to information contained in a petition for reconsideration filed by Dimension concerning the County's certification.[16] Americable also provides a copy of Dimension's channel line-up which indicates that Dimension offers a total of 45 channels, including more than 30 non-broadcast channels.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[17] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[18] Based on the evidence, we find that Americable has not met its burden. (*Disposition of Dimension's Direct Effective Competition Challenge*

8. With respect to determining whether Americable is subject to effective competition under the competing provider test, we find that Americable does not provide the appropriate household data necessary to determine that it meets the test. Americable calculates its household data by dividing its franchise area into northern and southern portions. Americable provides census data which shows that there are 2,739 households in the southern portion of Americable's franchise area. However, in the northern portion of the franchise area, Americable bases its household data on the assumption that it serves an equal distribution of households in both the northern and southern portions of its franchise area. Thus, Americable assumes that the northern portion of the franchise area also has 2,739 households. Considering the fact that census data is not available for the northern portion of Americable's franchise area, we would accept a reliable estimate for that area, whether from other reliable, objective sources, or from a reasonably accurate methodology employed by the

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[11] Americable has a franchise to serve certain unincorporated areas of Mohave County. Americable refers to this area as its Fort Mohave franchise area. Americable asserts that its Fort Mohave franchise area is roughly split into two portions: the northern portion consisting of Fort Mohave Mesa; and, the southern portion consisting of Mohave Valley and Willow Valley. Americable has provided evidence which indicates that it has separate franchise agreements to serve other areas of the County.

[12] As the Commission has stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[13] As support for this estimate, Americable provides a declaration under penalty of perjury from William J. McCarthy, General Manager, dated December 23, 1994.

[14] The data submitted by Americable illustrates how many homes are passed and served by Americable in each area of the County (i.e. the number are provided based on each area served and not by how many homes are served in the entire County).

[15] Americable states that it is unclear as to whether its Fort Mohave franchise area is coterminous with that of Dimension. Americable asserts that the map, provided to the Commission by the County, "appears to suggest that Dimension's franchise area includes at least the same areas as Amerciable Fort Mohave, Arizona franchise area." However, we note that the Mohave County Board of Supervisors submits evidence to the contrary. *See* Letter to Daren A. Benzi, from David J. Grisez, County Manager (December 20, 1994) (neither of the franchise areas are exactly the same, and in the Mohave Valley area the Americable franchise area falls entirely within the boundaries of Dimension's franchised area).

[16] Americable claims that it requested competitive information on Dimension's reach and number of subscribers from Dimension on October, 29, 1993. Americable claims that Dimension never responded to this request. Therefore, for purposes of this proceeding, Americable relies on the numbers set forth by Dimension in Dimension's petition, and its own records to determine Dimension's data for purposes of the effective competition test.

[17] 47 C.F.R. § 76.906.

[18] 47 C.F.R. § 76.911(b)(1).

operator. However, we can not accept the household data based on the evidence provided by Americable. We find no basis to conclude that an equal distribution of households in the northern and southern portion of a franchise area is a reasonably accurate method for calculating the total number of households in the franchise area. Accordingly, we are not able to find that Americable is subject to effective competition under the competing provider test.

9. With respect to the low penetration test, Americable argues that it serves 1,298 of the 5,478 households, or 23.7 per cent of the total number of households in its franchise area. However, as we find that Americable has not submitted reliable evidence regarding the number of households in its franchise area, we can not find that Americable serves fewer than 30 per cent of the households in its Fort Mohave franchise area.[19]

10. As Americable has not submitted sufficient evidence demonstrating that its cable system serving certain unincorporated areas of Mohave County is subject to effective competition under either the competing provider test or the low penetration test, its petition is denied.

## III. ORDERING CLAUSES

11. Accordingly, IT IS SO ORDERED that the petition for reconsideration filed by Americable International Arizona, Inc. challenging the certification of Mohave County, Arizona to regulate basic cable rates IS DENIED.

12. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

13. IT IS FURTHER ORDERED that Americable SHALL FILE the required rate justifications on the appropriate forms with Mohave County, AZ within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the franchising authority that it is regulating Americable's rates, whichever is later.

14. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[19] Americable cites to *Twin County Trans Video, Inc.*, DA 94-1517 (released December 19, 1994) wherein the Commission recognized that the U.S. Census does not always have available the total number of households for all communities and that many cable operators do not collect such information. The Commission also stated that it would examine the totality of the evidence submitted by the cable operator to see if conclusions can be drawn from it about the percentage of households passed by both operators. However, in *Twin County Trans Video, Inc.*, although the operator relied on the number of housing units (occupied and vacant) passed to support its claim, it did submit information from a reliable, objective source, (i.e. census data), by which the Commission could calculate the number of households in the franchise area. Here Americable does not base its estimated household number on any reliable objective source and does not provide any reliable objective source by which we could determine the number of households. In addition, we note that although we found the household data provided by Americable asserted competitor, Dimension, to be acceptable, *See American Cable Television, Inc. (d/b/a/ Dimension Cable Services)*, DA 95-175 (released February 8, 1995), we are not able to rely on that data in considering Americable petition because the franchise areas for the two operators are not coterminous. *See* n.15, *supra*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TELESAT CABLEVISION, INC.

Petition for Reconsideration

of Certification of
Orange County, Florida
to Regulate Basic Cable Service Rates
(FCC Community ID No. FL0851)

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 7, 1995; Released: February 8, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On October 28, 1993, Telesat Cablevision, Inc. ("Telesat") filed a timely petition for reconsideration challenging the certification of Orange County, Florida ("County") to regulate its rates for basic cable service and associated equipment.[1] The County filed an opposition to Telesat's petition for reconsideration to which Telesat filed a reply. In addition, both parties submitted supplemental pleadings in response to the Commission's July 29, 1994 Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition.[7]

## II. DISCUSSION

3. Telesat argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in its franchise area, which is comprised of the unincorporated areas within Orange County.[8] Specifically, Telesat claims that it serves 21,031 of the 160,356 households in the franchise area or 13.1 percent of the total number of households. As supporting documentation, Telesat provides 1990 Census data[9] which demonstrates that there are 160,356 households (that is, occupied housing units)[10] in its franchise area. Telesat also submits a computer print-out with sufficient subscriber information to show that it serves 21,031 households in the franchise area. Finally, Telesat provides an affidavit by a responsible official certifying to the accuracy of the data included in the petition and the supplement thereto.

4. In its opposition to Telesat's petition, the County argues that Telesat is not subject to effective competition because it has "redefined" its franchise area.[11] The County

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[1] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on September 28, 1993, which became effective October 26, 1993.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra*.

[10] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Florida, 1990 CPH-1-11, table 5 at 73.

[11] In the *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restrictive

alleges that Telesat has made an affirmative decision to limit its service area to only a portion of its authorized franchise area. The County argues that by including household data from portions of the franchise area that Telesat does not actually serve, Telesat miscalculates its penetration level. As supporting documentation, the County submits the following: a copy of an Orange County statistical report which, *inter alia,* calculates the penetration rates of the five cable operators serving the County,[12] a copy of Telesat's 15 year franchise agreement with the County dated June 23, 1986, and three maps separately detailing (1) the areas actually served by Telesat and its competitors within Orange County as of April 27, 1993; (2) the location of the unincorporated areas of Orange County as of 1993; and (3) the areas actually served by Telesat and its competitors within Orange County as of August 22, 1991. The County asserts that these exhibits demonstrate that Telesat does not offer service to its entire authorized franchise area and has not expanded its service beyond the portions it was already serving in 1991.[13] In addition, the County submits a copy of a 1992 contract which documents Telesat's sale of a portion of its Orange County system, located in the south central region of the County known as Meadow Woods, to its competitor, Cablevision Industries. Because this sale actually reduced Telesat's coverage in its service area, the County argues that the sale lends further support for its argument that Telesat has redefined its franchise area by restricting its area of service to limited portions of its entire authorized franchise area.

5. In its reply, Telesat argues that it has not limited its service area, nor has it redefined its franchise area. To the contrary, Telesat maintains that since 1986, when it was granted its franchise, it has built three separate, non-contiguous overbuild systems in Orange County. Telesat claims that the County's Map "B", which depicts Telesat's actual service area in 1993, proves that Telesat has expanded its service area beyond its 1991 borders, as depicted in the County's Map "D". Furthermore, Telesat contends that none of the evidence submitted, including the 1992 contract between it and Cablevision, sufficiently demonstrates that Telesat has affirmatively excluded any portion of its authorized franchise area from its potential service. Instead, Telesat asserts that because of the existence of actual competition in its franchise area, the lack of expansion over a period of less than two years does not prove that Telesat has chosen to restrict its service area or redefine its franchise area. To further emphasize its position, Telesat claims that much of its system is in overbuild situations with the other operators providing service in the County and that this makes expansion throughout the County more competitive and, therefore, more difficult.

6. As a preliminary matter, we are not persuaded that Telesat has affirmatively restricted its service area to some portion that is appreciably smaller than Telesat's authorized franchise area, for purposes of effective competition. The County concedes that Telesat's authorized franchise area encompasses the entire unincorporated area of Orange County. Moreover, as the Commission stated in the *First Recon. Order,* "the fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[14] The County has not offered sufficient evidence showing that Telesat has affirmatively decided to forego the possibility of further expanding its area of service within its authorized franchise area. We agree with Telesat that the County cannot only rely on Telesat's expansion record during a period of time encompassing less than two years over the life of a 15 year franchise to determine that Telesat has restricted its efforts at further expansion.

7. However, we recognize that, in 1992, Telesat sold the Meadow Woods portion of its system, located in the south central region of Orange County, to Cablevision Industries. As a condition to the contract of sale, Telesat agreed to refrain from providing any type of cable service to the Meadow Woods area for a period of five years. This evidence is sufficient to prove that Telesat has redefined its franchise area to exclude the Meadow Woods area.[15] However, even when accounting for the exclusion of Meadow Woods from Telesat's franchise area, the record reveals that Telesat's penetration rate is still less than 30 percent. Specifically, the evidence shows that even when excluding the total number of households located in the Meadow Woods area from the total number of households located in Telesat's entire franchise area, there are still 158,829 households in Telesat's redefined franchise area. Applying the subscriber number to this figure yields a revised penetration rate of 13.2 percent, resulting in a *de minimis* increase from its original penetration rate of 13.1 percent. While the County has demonstrated that Telesat has made an affirmative decision to redefine its service area, the record indicates that the resulting penetration rate still remains less than 30 percent.

8. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[16] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by

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definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator, "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[12] The County has issued non-exclusive franchises to five cable operators (Hunter's Creek, Telesat Cablevision, Cablevision, Inc., Cablevision of Central Florida and Central Florida Satellite Cable). Each operator is authorized to serve the unincorporated area of Orange County.

[13] The County claims that according to a cable television statistical report prepared by the Orange County Cable Communications Department for the second quarter of 1993, Telesat's system physically passes 41,792 residential units in its franchise area and serves 21,031 of those units. The County claims that comparing these two numbers yields a penetration rate of 50.32 percent, which is significantly higher than a rate of 30 percent or less, as required by the low penetration test for effective competition.

[14] *First Recon. Order, supra.*

[15] Although we are accepting the terms of this agreement as evidence that Telesat has redefined its franchise area, we are expressing no opinion on whether a 5-year anti-competitive agreement is reasonable or in accordance with the Communications Act.

[16] 47 C.F.R. § 76.906.

Section 76.905 of the Commission's rules, is present within its franchise area.[17] Telesat has met this burden.[18] Telesat appropriately relied on data reflecting the number of households as required by our rules.[19] Relying on this data, Telesat has submitted sufficient evidence demonstrating that its cable system, serving Orange County, its franchise area, serves 21,031[20] of the 158,829 households, or 13.2 per cent of the households, within its franchise area. Thus, we find that Telesat's system serving Orange County is subject to effective competition.[21] Accordingly, its petition is granted.

## III. ORDERING CLAUSES

9. Accordingly, IT IS SO ORDERED that the petition for reconsideration filed by Telesat Cablevision, Inc. challenging the certification of Orange County, Florida to regulate Telesat's basic service cable rates IS GRANTED.

10. IT IS FURTHER ORDERED that the certification of Orange County to regulate the rates for basic cable service and associate equipment of Telesat Cablevision, Inc. IS RESCINDED.

11. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[17] 47 C.F.R. § 76.911(b)(1).

[18] We draw no conclusion as to whether Telesat has provided the Commission with sufficient evidence alleging effective competition based on the competing provider test. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2). We recognize that there are five multichannel video programming distributors within Orange County. However, to date, the Bureau has not been asked to determine that competition exists within the franchise area due to their presence. Should any of the operators submit new pleadings alleging effective competition under this second test, it will be considered at that time.

[19] *Third Recon. Order, supra* note 10.

[20] Telesat operates three separate systems within its Orange County franchise. For purposes of its effective competition claim, Telesat has consolidated its subscribership for all three systems. Our rules require that if an operator has more than one system within a single franchise area, the operator should make separate effective competition claims for each individual system. *Rate Order* at 5672. However, because each of Telesat's separate claims would necessarily result in individual penetration rates that are lower than the overall penetration rate claimed for the consolidated systems, we will accept Telesat's filing for review and decide its claim based on the information provided.

[21] We note that two other operators, Cablevision Industries (CVI) and Hunter's Creek Cablevision have also filed petitions for revocation of the County's certification to regulate basic rates and associated equipment. *See Cablevision Industries, et. al., Petition for Revocation of Certification of Orange County, Florida to Regulate Basic Cable Service Rates,* DA 95-179 (released February 8, 1995), *Hunter's Creek Communications, Petition for Revocation of Certification of Orange County, Florida to Regulate Basic Cable Service Rates,* DA 95-178 (released February 8, 1995). Because each operator, including Telesat, was granted an identical franchise to serve the unincorporated areas of Orange County, we would expect that the reference to the total number of households in the franchise area would also be identical in each operator's filing. However, CVI asserts in its filing that there are 120,999 total households in its franchise area, whereas Telesat asserts that there are 160,356. Each operator is able to demonstrate how it arrived at its numbers and we are unable to conclude that one number is more accurate than the other. We therefore note that Telesat would meet the low penetration test for effective competition using either the household figures presented in its own petition or the figures presented in CVI's petition. If the household figure (120,999) used in CVI's petition is applied to the number of subscribers Telesat has (21,031), Telesat's penetration level would be 17.4 percent.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

HUNTER'S CREEK COMMUNICATIONS CORP., dba HUNTER'S CREEK CABLEVISION

Petition for Revocation

of Certification of
Orange County, Florida
to Regulate Basic Cable Service Rates
(FL1012)

## MEMORANDUM OPINION AND ORDER

**Adopted: February 7, 1995; Released: February 8, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On September 12, 1994, Hunter's Creek Communications Corp., dba Hunter's Creek Cable ("Hunter's Creek") filed a petition for revocation challenging the certification of Orange County, Florida ( the "County") to regulate the system's rates for basic cable service and associated equipment.[1] On October 4, 1994, Hunter's Creek filed a request for stay from local regulation by the County. The County filed a Motion to Dismiss and an opposition to the petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for revocation of the franchising authority's certification at any time after the date such certification becomes effective.[5] Regardless of its grounds, however, a petition for revocation does not automatically stay a franchising authority's power to regulate basic cable rates.[6]

## II. DISCUSSION

### Hunter Creek's Effective Competition Claim

3. Hunter's Creek argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Orange County, its franchise area.[7] Hunter's Creek claims that it serves only 1.29 percent of the 237,876 residential units or "households" in the County. As supporting documentation for its residential unit number, Hunter's Creek provides data from the Orange County Cable Communications Department Cable TV Statistical Report. This document, however, apparently lists a total of 237,876 "dwelling units" passed by all the cable systems operating in Orange County.[8] Hunter's Creek also submits a computer printout with subscriber information which purports to support the number of subscribers to its cable system in the franchise area as of September 1, 1994. According to this computer printout, Hunter's Creek served 1,658 subscribers.

4. In its objection to Hunter's Creek's petition, the County argues that Hunter's Creek is not subject to effective competition because it has "redefined" its franchise area. The County alleges that Hunter's Creek has made an affirmative decision to limit its service area to specific areas in the County even though its franchise does not restrict service to a specific area of the County.[9] According to the County, Hunter's Creek's actual service area consists of

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[1] Orange County filed its Certification of Franchising Authorities to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 28, 1993. Its certification became effective on October 28, 1993.

[2] Communications Act of 1934 § 623 (a)(4), 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *PSee also* 47 U.S.C. § 543(a)(4).

[5] The County appears to suggest that a cable operator may not file a petition for revocation on the basis of effective competition. To the extent that the County is making such an argument, we disagree. There is nothing in the Commission's rules which prohibits a cable operator from making an effective competition claim in a petition for revocation proceeding. *See* 47 C.F.R. § 76.914.

[6] 47 C.F.R. § 76.914(d).

[7] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of a cable system that is not subject to effective competition may be regulated. One of the bases upon which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[8] The County has issued non-exclusive franchises to five cable operators (Hunter's Creek, Telesat Cablevision, Cablevision, Inc., Cablevision of Central Florida and Central Florida Satellite Cable). Each operator is authorized to serve the unincorporated areas of Orange County.

[9] In its *First Order on Reconsideration* the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) . Generally, "[a] franchise area is the area a system operator is

1,820 residential units, of which Hunter's Creek serves 1,441. As support, the County submits color-coded maps of the County, for August 22, 1991 and April 27, 1993, which show what the County alleges as Hunter's Creek's actual "franchise area" for purposes of the effective competition standard. According to the County, these maps demonstrate that Hunter's Creek has made an affirmative decision to limit its service to a "pocket" of territory within the south central portion of the unincorporated area. It argues that a comparison of the two maps demonstrates that Hunter's Creek's service area has remained stagnant, thereby leading to the conclusion that Hunter's Creek has not been steadily expanding its service area. Within this redefined franchise area, the County argues that Hunter's Creek actually serves 79.18 percent of residential units, and therefore is not subject to effective competition.

5. As a preliminary matter, we are not persuaded that the appropriate franchise area for purposes of effective competition is something less than the entire unincorporated areas of Orange County. The County has not submitted sufficient evidence, such as statements from the cable operator or evidence of refusals by Hunter's Creek to expand its cable service. Rather, the County merely argues that Hunter's Creek has not expanded its service throughout its franchise area. As the Commission has stated previously, however, "[t]he fact that franchise area has not yet been filled out by construction of a system would not by itself be taken as redefining the service area."[10]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] Hunter's Creek did not support its effective competition claim with data reflecting the number of "households" in the franchise area, as required by our rules. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994).[13] Nonetheless, we note that in *Telesat Cablevision, Inc., Petition for Reconsideration of Certification of Orange County, Florida to Regulate Basic Cable Service Rates (FCC Community ID No. FL0851)*, DA 95-177, (released February 8, 1995), Telesat Cablevision, another cable operator which also serves the unincorporated areas of Orange County, states that, based on the 1990 Census, there are 160,356 households (*i.e.*, occupied housing units) in the unincorporated areas of Orange County. In addition, in *CableVision Industries Limited Partnership, et. al., Revocation of Certification of the Certification of Orange County, Florida to Regulate Basic Cable Rates*, DA 95-179, (released February 8, 1995), CableVision Industries ("CVI"), a third operator which also serves the unincorporated areas of Orange County, asserts that there are 120,999 households in the unincorporated areas of Orange County. Both Telesat and CVI are able to demonstrate how they arrived at their respective numbers and we are unable to conclude that one number is more accurate than the other. However, we note that Hunter's Creek, which has the same franchise area as the other two operators, would meet the low penetration test for effective competition using either the household figures presented in Telesat's petition (160,356) or the household figures presented in CVI's petition (120,999). If the household figure (160,356) in Telesat's petition is applied to the number of subscribers Hunter's Creek serves (1,658), Hunter's Creek penetration level would be 1.03 percent. If the household figure (120,999) presented in CVI's petition is used, Hunter's Creek's penetration level would be 1.37 percent. Thus, we find that Hunter's Creek's system serving the unincorporated areas of Orange County is subject to effective competition. Accordingly, its petition is granted.[14]

## III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for revocation filed by Hunter's Creek Communications Corp., dba Hunter's Creek Cable challenging the certification of Orange County to regulate Hunter's Creek's basic cable rates IS GRANTED.

8. IT IS FURTHER ORDERED that the certification of Orange County to regulate the rates for basic cable service and associate equipment of Hunter's Creek Communications Corp., dba Hunter's Creek Cable IS RESCINDED.

9. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[10] *First Recon. Order, supra.*

[11] 47 C.F.R. §76.906.

[12] 47 C.F.R. §76.911(b).

[13] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Recon. Order, supra.* The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Florida, 1990 CPH-1-11, Table 5, at 73.

[14] We draw no conclusion as to whether Hunter's Creek has provided the Commission with sufficient evidence alleging effective competition based on the competing provider test. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2). We recognize that there are five multichannel video programming distributors within Orange County. However, to date, the Bureau has not been asked to determine that competition exists within the franchise area due to their presence. Should any of the operators submit new pleadings alleging effective competition under this second test, it will be considered at that time.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CABLEVISION INDUSTRIES LIMITED PARTNERSHIP; CABLEVISION INDUSTRIES OF CENTRAL FLORIDA, INC.; AND CABLEVISION INDUSTRIES OF MIDDLE FLORIDA, INC. d/b/a CABLEVISION INDUSTRIES

Petition for Revocation of Certification

of the Certification of Orange County, Florida to Regulate Basic Cable Rates (FL0548 & FL0569)

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 7, 1995; Released: February 8, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On March 21, 1994, Cablevision Industries Limited Partnership, Cablevision Industries of Central Florida, Inc., and Cablevision Industries of Middle Florida, Inc. d/b/a Cablevision Industries (collectively "CVI") filed a Petition for Revocation of Certification challenging the certification of Orange County, Florida to regulate rates for basic cable service and associated equipment.[1] Orange County filed a Motion to Dismiss the Petition for Revocation of Certification and, alternatively, Response to the Petition on April 15, 1994. Orange County filed a supplemental pleading pursuant to the Commission's July 29, 1994 Order.[2] CVI also filed a supplemental pleading on January 4, 1995.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation.[8] However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[9]

## II. DISCUSSION

### Disposition of CVI's Effective Competition Claim

3. CVI states that it has three systems in Orange County and bases its effective competition claim on aggregated information representing all three systems together. CVI argues that its cable systems in Orange County are subject to effective competition because together they serve fewer than 30 percent of the households in the unincorporated sections[10] of Orange County, its franchise area.[11] CVI claims that, through its three systems, it currently serves

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[1] Orange County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 23, 1993, which became effective October 23, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).q

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition.47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*) .

[7] 47 C.F.R. §76.911(c).

[8] 47 C.F.R. §76.914. Orange County appears to suggest that a cable operator may not file a petition for revocation on the basis of effective competition. To the extent that the County is making such an argument, we disagree. There is nothing in the Commission's rules which prohibit a cable operator from making an effective competition claim in a petition for revocation.

[9] 47 C.F.R. §76.914(d).

[10] Orange County has issued non-exclusive franchises to five cable operators (Hunter's Creek, Telesat Cablevision, Cablevision, Inc., Cablevision of Central Florida and Central Florida Satellite Cable). Each operator is authorized to serve the unincorporated areas of Orange County.

[11] The 1992 Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 §623(l)(1)A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1).

only 30,761[12] of the 120,999 households (that is, occupied housing units)[13] in Orange County, or 25.4 percent of the total number of households.[14] As supporting documentation, CVI provides 1990 Census data which establishes that there are 120,999 households in the unincorporated sections of Orange County which CVI is franchised to serve.[15] CVI submits a computer print-out with sufficient subscriber information to support its claim that its separate systems serve 30,761 subscribers in the franchise area. CVI also supplied records dating back ten years which detail the size and frequency of its system expansions in the unincorporated sections of Orange County. Finally, CVI provides an affidavit under penalty of perjury by the vice president of CVI's parent corporation certifying the accuracy of the data included in the Petition.[16]

4. Orange County's Response states that CVI is not subject to effective competition because of its affirmative decision to limit its franchise area.[17] Orange County argues that CVI's appropriate franchise area should be defined as those areas in the unincorporated sections of Orange County in which CVI has chosen to render service. In this regard, Orange County asserts that CVI's penetration rate for its Evans' system is 51.85 percent, and the penetration rate for the Winter Garden system is 61.26 percent.[18] In its supplement filed pursuant to the Commission's *Effective Competition Order*, Orange County largely reiterates the arguments contained in its Response which assert that CVI is not subject to effective competition under the Commission's low penetration test because it has affirmatively redefined its franchise area. Orange County attempts to demonstrate that CVI has redefined its franchise area by showing that CVI's service territory expanded only slightly between 1991 and 1993. Orange County then concludes that it is apparent from its history as a franchise operator that CVI is not serious about serving all of the unincorporated areas of Orange County.

5. As a preliminary matter, we are not persuaded that the appropriate franchise area for purposes of effective competition is something less than all of the unincorporated sections of Orange County. Orange County concedes that CVI's franchise area encompasses all of the unincorporated areas of Orange County. Moreover, Orange County has not met its burden of demonstrating that CVI has made an affirmative decision to redefine its service area. As the Commission stated in the *First Recon. Order*, "the fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[19] Orange County has not offered evidence showing that CVI has refused to provide service beyond the area it currently serves. To the contrary, Orange County's pleadings demonstrate that CVI's service territory has expanded, albeit modestly, in the last two years. In addition, CVI provided the Commission with evidence that it has consistently expanded its three systems since the inception of its service in Orange County. Therefore, we conclude that Orange County has failed to sustain its burden of proof that CVI redefined its franchise area.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[20] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within the franchise area.[21] CVI has met this burden . We find that CVI appropriately relied on data reflecting the number of households as required by our rules.[22] Relying on this data, the Commission finds that CVI has submitted sufficient evidence demonstrating that its three cable systems, serving the unincorporated sections of Orange County, its franchise area, serve 30,761 of the 120,999 households, or 25.4 percent of the households within its franchise area.

7. The Commission notes that CVI incorrectly consolidated information from each of its three systems in bringing its Petition. Under our rules, CVI should have filed a separate effective competition claim for each system in the

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[12] According to CVI, it serves 20,672 subscribers on its Evans system (serving the eastern section of Orange County), 7,972 subscribers on its Magna system, and 2,117 subscribers on its Winter Garden system (each serving the western section of Orange County).

[13] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . The count of households in the 1990 Census reflects only occupied housing units. *See* Bureau of Census, 1990 Census of Population and Housing, Summary Population and Housing characteristics, Florida, 19990 CPH-1-11, Table 5, at 73.

[14] CVI's initial Petition in this proceeding incorrectly contained statistics compiled by the Orange County Cable Communications Department which were based on the number of residential electric meters in the unincorporated sections of Orange County. CVI's supplement, however, contained actual Census data regarding the number of households in the unincorporated sections of Orange County.

[15] CVI appropriately does not include the households which are part of the Winter Garden Ocoee division of Orange County because that division is part of a separate franchise.

[16] Affidavit of David L. Testa, dated January 3, 1995.

[17] In its *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*) . Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[18] Orange County's calculated CVI's penetration rate for the Evans system by dividing 19,840 subscribers by the 38,262 residential units passed yielding a penetration rate of 51.85 percent. Orange County calculated CVI's penetration rate for the Winter Garden system by dividing 9,617 subscribers by the 15,698 residential units passed yielding a penetration rate of 61.26 percent. Orange County appears to have combined the totals for the Winter Garden and Magna systems in calculating its penetration rate for Winter Garden.

[19] *First Order on Reconsideration, Second Report and Order, and Third Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (*"First Recon. Order"*) .

[20] 47 C.F.R. §76.906.

[21] 47 C.F.R. §76.911(b)(1).

[22] *Third Recon. Order, supra.* O

subject franchise area.[23] CVI's consolidation, however, only minimized its chances of demonstrating effective competition by increasing its penetration rate. If it had filed a separate effective competition claim for each of its three systems, CVI also would have, in each instance, satisfied the Commission's low penetration effective competition test. For example, performing a separate effective competition analysis for each of CVI's systems, we find that the Evans system would serve 17.1 percent, the Magna system would serve 6.6 percent, and the Winter Garden system would serve 1.7 percent of the households in the unincorporated sections of Orange County. Thus, under each of the above scenarios, we find that CVI's system serving the unincorporated sections of Orange County is subject to effective competition.[24] Accordingly, its Petition is granted.[25]

## III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the Petition for Revocation filed by Cablevision Industries Limited Partnership, Cablevision Industries of Central Florida, Inc., and Cablevision Industries of Middle Florida, Inc. d/b/a Cablevision Industries challenging the Certification of Orange County, Florida IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of Orange County, Florida to regulate the rates for basic cable service and associated equipment of Cablevision Industries Limited Partnership, Cablevision Industries of Central Florida, Inc., and Cablevision Industries of Middle Florida, Inc. d/b/a Cablevision Industries IS REVOKED.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules.[26]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[23] *Rate Order* at 5672.

[24] We note that two other operators, Telesat Cablevision and Hunter's Creek Communications have also filed challenges to Orange County's certification to regulate basic cable rates and associated equipment. *See Telesat Cablevision, Inc., Petition for Reconsideration of Certification of Orange County, Florida to Regulate Basic Cable Service Rates* (FCC Community ID No. FL0851), DA 95-177, (released February 8, 1995); *Hunter's Creek Communications Corp., d/b/a Hunter's Creek Cablevision, Petition for Revocation of Certification of Orange County, Florida to Regulate Basic Cable Service Rates* (FCC Community ID No. FL1012), DA 95-178, (released February 8, 1995). Because each operator, including CVI, was granted an identical franchise to serve the unincorporated areas of Orange County, we would expect that the reference to the total number of households in the franchise area would also be identical in each operator's filing. However, Telesat asserts in its filing that there are a total of 160,356 households in its franchise area, whereas CVI asserts that there are 120,999 households. Each operator is able to demonstrate how it arrived at its numbers, and we are unable to conclude that one number is more accurate than the other. We therefore note that CVI would meet the low penetration test for effective competition using either the household figures presented in its own petition or the figures presented in Telesat's petition. If the household figure (160,356) used in Telesat's petition is applied to the number of subscribers CVI has (30,761), CVI's penetration level would be 19.18 percent.

[25] We draw no conclusion as to whether CVI has provided the Commission with sufficient evidence alleging effective competition based on the competing provider test. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2). We recognize that there are five multichannel video programming distributors within Orange County. However, to date, the Bureau has not been asked to determine that competition exists within the franchise area due to their presence. Should any of the operators submit new pleadings alleging effective competition under this second test, it will be considered at that time.

[26] 47 C.F.R. §0.321.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TELE-MEDIA COMPANY
OF MARYLAND

Petition for Reconsideration
of Certification of
Cecil County, Maryland (MD0136)
to Regulate Basic Cable Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 8, 1995; Released: February 9, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On March 22, 1994, Tele-Media Company of Maryland ("Tele-Media") filed a timely petition for reconsideration challenging the certification of Cecil County, Maryland ("Cecil County" or the "County") to regulate rates for basic cable service and associated equipment.[1] On March 31, 1994, the County filed its opposition. On August 19, 1994, the County submitted a supplemental pleading in response to the Commission's July 29, 1994 Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition as defined in the Communications Act.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition unless they have actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition as defined in the Communications Act.[7]

## II. DISCUSSION

3. In its petition, Tele-Media argues that its cable system is subject to effective competition as defined in the Communications Act in the unincorporated areas of Cecil County, its franchise area, because it serves fewer than thirty percent of the total number of households.[8] Specifically, Tele-Media claims that it serves 252 of the 20,000 "households" or approximately 1.26 percent of the "households" in the unincorporated areas of Cecil County.

4. In its objection to Tele-Media's petition and its supplemental filing, Cecil County argues that Tele-Media is not subject to effective competition because it has "redefined" its franchise area.[9] Cecil County alleges that Tele-Media has made an affirmative decision to limit its service area to a small portion of Cecil County that is not served by any other cable operator[10] even though its franchise does not restrict service to a specific area within the unincorporated areas of Cecil County. It also claims that Tele-Media does not appear to be planning significant expansion of its service area and, indeed, that Tele-Media

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[1] Cecil County submitted its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition" ("Form 328") on March 3, 1994. Its certification became effective on April 2, 1994.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] In the *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (*"First Reconsideration Order"*). Generally, "[a] franchise area is the area a system is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restrictive definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator, "has itself, through its own conduct, self-defined the area to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision. . . to restrict service." *Id.*

[10] Cecil County has issued franchises to four cable operators. Each has a franchise to serve the unincorporated areas of Cecil County and, therefore, the four cable operators franchises are coterminous with each other. We draw no conclusion as to whether evidence could be provided showing effective competition based on the competing provider test. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2). We recognize that there are four multichannel

"has not appreciably expanded the area it serves beyond the service area it has served since 1981 or shortly thereafter."[11] Thus, Cecil County argues that Tele-Media's showing of effective competition must be based on its "redefined" franchise area.

5. As a preliminary matter, we are not persuaded that the appropriate franchise area for purposes of effective competition is something less than all of the unincorporated areas of Cecil County. Cecil County has presented no evidence indicating that this cable operator, by its own conduct, has made an affirmative decision to restrict service. As the Commission has stated previously, "[t]he fact that a franchise area has not yet been filled out by construction of a system would not by itself be taken as redefining the service area."[12]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition. The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by § 76.905 of the Commission's rules, is present within the franchise area.[13] Tele-Media did not support its effective competition claim with adequate documentation. Nonetheless, we note that in *In the Matter of CECILTON CATV, INC., Petition for Reconsideration of Certification of Cecil County, Maryland,* DA 95-188, (released February 9, 1995), the cable operator serving the same franchise area submitted a copy of the relevant 1990 Census data[14] demonstrating that there are 18,142[15] households (*i.e.,* occupied housing units)[16] in the unincorporated areas of Cecil County. As both Tele-Media and Cecilton are authorized to serve the same franchise area, we believe that the public interest is served by taking official notice of the household information contained in the *Cecilton* case. Relying on this household data, we find that Tele-Media serves 252 of the 18,142 households in the franchise area, or 1.38 percent of the total number of households. Accordingly, we find that Tele-Media serving the unincorporated areas of Cecil County is subject to effective competition as defined in the Communications Act.

## III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Tele-Media Company of Maryland challenging the certification of Cecil County, Maryland to regulate Tele-Media's basic cable rates IS GRANTED.

8. IT IS FURTHER ORDERED that the certification of Cecil County to regulate basic cable service rates of Tele-Media is RESCINDED.

9. This action is taken pursuant to delegated authority under § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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video programming distributors within Cecil County. However, to date, the Bureau has not been asked to determine that competition exists within the franchise area due to their presence. Should any of the operators have a basis to submit pleadings alleging effective competition under this second test, and should any of them do so, it will be considered at that time.

[11] Tele-Media's franchise was granted in 1981.

[12] *First Recon. Order, supra.*

[13] 47 C.F.R. § 76.911(b)(1).

[14] As the Bureau has stated recently, 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates,* 9 FCC Rcd 3656 (1994).

[15] The 1990 Census indicates that there are 24,725 households in Cecil County. To calculate the number of households in the unincorporated areas of the County, Cecilton subtracted the number of households within Cecilton (195), Chesapeake City (290), Elkton (3,333), Charlestown (228), Northeast (812), Rising Sun (504), Perryville (980), and Port Deposit (241). These municipalities represent the incorporated areas of the County. This calculation yielded a total of 18,142 households.

[16] *See Third Order on Reconsideration,* MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order,* "[a]s used in the Cable Act, we presume that Congress did not intend households to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra.* The term "household" is defined for purposes of the 1990 Census data as "all persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

VENTURA COUNTY CABLEVISION

Motion to Dismiss
Appeal of Local Rate Order of
City of Ojai, CA

**ORDER**

**Adopted: February 6, 1995; Released: February 7, 1995**

By the Chief, Cable Services Bureau:

1. On August 11, 1994, Ventura County Cablevision ("Ventura") filed an appeal of the local rate order, adopted on July 12, 1994 by Ventura's franchising authority, the City of Ojai, California ("Ojai").[1] In the local rate order, Ojai established regulated rates for basic cable service and associated equipment, provided by Ventura, as allowed by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[2] The local order requires Ventura to implement certain rate reductions and to issue refunds to subscribers for overcharges levied for a time period dating back to September 1, 1993.[3]

2. On January 23, 1995, Ventura filed with the Commission a motion to dismiss its earlier filed appeal and stay request. In its motion, Ventura states that ". . . Ojai has amended the challenged local cable rate order, obviating [Ventura]'s need to prosecute an appeal." There being no opposition, Ventura's Motion to Dismiss is granted.[4]

3. Accordingly, IT IS ORDERED that Ventura County Cablevision's Appeal of the Local Rate Order of the City of Ojai, California IS DISMISSED. IT IS FURTHER ORDERED that Ventura County Cablevision's Request for Emergency Stay IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

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Meredith J. Jones
Chief, Cable Services Bureau

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[1] Ventura also filed a Request for Emergency Stay on August 11, 1994. Since we dismiss the appeal in this order, the request for stay will be dismissed as moot.

[2] Under the 1992 Cable Act and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 1002-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[3] Although the rate order was adopted by Ojai on July 12, 1994, the refund decision was not adopted until August 9, 1994.

[4] After consulting with the City of Ojai, Steven J. Horvitz of the law firm of Cole, Raywid & Braverman called the Cable Services Bureau on January 23, 1995 to inform the Bureau that the City of Ojai will not oppose Ventura's Motion to Dismiss.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

PARAGON CABLE

Appeals of Local Rate Orders
of the following Cities:
Gardena, CA
Hawthorne, CA
Lawndale, CA
Torrance, CA

**CONSOLIDATED ORDER**

**Adopted: February 6, 1995; Released: February 7, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. By this Order, we consolidate four proceedings into one and rule on the merits in each proceeding. In deciding this appeal, the Bureau has reviewed all the pleadings filed in each of the separate proceedings. We have determined that each of the proceedings are sufficiently similar and related to one another to justify the joint resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.[1] Specifically, the Bureau resolves in this Consolidated Order the four separate Appeals of Local Cable Rate Order filed on October 24, 1994, by Paragon Cable ("Paragon"),[2] the franchisee in this consolidated proceeding, of the local cable rate orders adopted by the following local franchising authorities: the Cities of Gardena, Hawthorne, Lawndale, and Torrance, California (collectively, "the Cities," unless otherwise specified).[3] The four cities decided to review Paragon's FCC Form 393 jointly.[4] The Cities based their findings contained in their respective local rate orders on the recommendations of a single consulting firm.[5] Each city's local rate order establishes a new regulated rate schedule for Paragon's basic service tier rates and associated equipment.[6] Specifically, each city's local rate order requires Paragon to implement certain rate reductions and to issue refunds to subscribers for overcharges levied during a time period dating back to September 1, 1993.

2. In each appeal, Paragon raises only one issue. Paragon argues that the Cities' decisions to treat its a la carte packages of two channels, WTBS and AMC, as regulated tiers of service are contrary to the objectives of the 1992 Cable Act and the Commission's a la carte rules and, therefore, the Cities' adverse rulings on Paragon's a la carte offerings should be overturned. In response, the Cities assert that they properly applied the Commission's guidelines on a la carte packages in treating Paragon's packages as regulated tiers.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[7] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[8] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in

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[1] Paragon Cable is represented in these four appeals by the same law firm. Except for minor factual variations tailored to the particular city being challenged in each appeal, the four separate appeals filed by Paragon Cable are identical and raise the same single issue: the appropriate regulatory treatment of two channels offered collectively as well as individually on an a la carte basis. Because of the similarity of Paragon's four appeals, we will refer to them, collectively, as "Appeals."

[2] Paragon also filed Requests for Emergency Stay: on October 7, 1994, of the local orders adopted by the cities of Gardena and Lawndale (in a single petition); on October 20, 1994, of the local order by the City of Hawthorne; and also on October 20, 1994, of the local order by the City of Torrance. Because we are resolving these disputes on the merits presented in Paragon's several appeals, the petitions for stay have been rendered moot.

[3] The City of Gardena adopted its Local Cable Rate Order on September 27, 1994; the City of Hawthorne Adopted its Local Cable Rate Order on October 10, 1994; the City of Lawndale adopted its Local Cable Rate Order on September 26, 1994; and the City of Torrance adopted its Local Cable Rate Order on October 11, 1994. While each city filed a separate opposition to Paragon's Appeals, their respective oppositions are substantially identical.

[4] *See* Appeals, Exhibit A, containing local cable rate orders and a report by Telecommunications Management Corporation entitled "Review of FCC Forms 393 Submitted by Paragon Cable to the Cities of Gardena, Hawthorne, Lawndale and Torrance" ("TMC Report") at 1. We note that our rules permit the franchising authorities of communities that are served by the same system to make arrangements to share the costs of data collection (*e.g.*, hiring an independent consulting firm to review the Form 393 submitted by an operator) but make independent rate decisions. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5836-5838 (1993) ("*Rate Order*"). *See also* 47 C.F.R. §76.912 (1994).

[5] *Id.* TMC prepared a single report, containing its review of the Form 393 reporting on a system-wide basis and submitted by Paragon to the Cities of Gardena, Hawthorne, Lawndale and Torrance. The same report was used by each city in preparing its respective local order.

[6] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b). *See also* 47 C.F.R. §§ 76.922 and 76.924. We note that the new regulated rate schedules established by the Cities are identical since all four Cities relied upon the findings contained in the TMC Report. *See* TMC Report at 16.

[7] *See* 47 C.F.R. § 76.944.

[8] *See Rate Order*, 8 FCC Rcd at 5731; and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) ("*Third Reconsideration Order*").

rendering its local rate order.[9] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[10] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[11]

## II. DISCUSSION

4. Paragon asserts that the Cities improperly treated its collective offerings of two channels, WTBS and AMC, as regulated tiers.[12] Paragon argues that its a la carte packages comply with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[13] Paragon further argues that its a la carte packages fully comply with Commission rules for unregulated treatment existing at the time the packages were created.[14]

5. The a la carte packages at issue were first offered to Paragon's subscribers on September 1, 1993, the effective date of our rate regulations. As a result of the restructuring in each of the four communities, Paragon offered WTBS and AMC, which had previously been available as part of Paragon's single tier of service, on an individual basis and also as a package that Paragon alleges is not subject to rate regulation.

6. The facts presented in these appeals closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Paragon Cable*, Irving, Texas, LOI-93-25, DA 94-1315 (Cab. Serv. Bur., released Nov. 25, 1994) (*"Paragon of Irving"*), in which we resolved the regulatory status of an la carte package offered by Paragon on its Irving, Texas, system that is essentially the same as the a la carte package at issue in these appeals. Specifically, the a la carte package at issue in the *Paragon of Irving* order was a two channel package, made up of channels formerly available on the basic service tier, which was offered as part of a restructuring. In that case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[15]

7. We find that the Cities' determinations that Paragon's a la carte packages are regulated tiers are inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Paragon of Irving*. We further find that, in accordance with *Paragon of Irving*, Paragon's a la carte packages should not be treated as rate regulated tiers of service. Accordingly, we are remanding this issue to the Cities so that they can enter orders consistent with our findings in *Paragon of Irving*.[16]

## III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the appeals of the local rate orders, with respect to the issue of the regulatory status of Paragon's a la carte packages, are REMANDED to the Cities for resolution in accordance with the terms of this Order.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] *Id.*

[10] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[11] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

[12] *See* Appeals at 1-2.

[13] *Id.* at 2.

[14] *Id.* at 3. *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 1164, 1184-85 (1993).

[15] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specificaliy, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[16] We need not address Paragon's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the' fact that we grant Paragon's appeal on the a la carte issue and remand this case to the Cities so that they may enter orders consistent with our findings in our letter of inquiry orders.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**February 14, 1995**

**Released: February 14, 1995**

Paul Glist, Esq. REPLY REFER TO:
Cole, Raywid & Braverman, L.L.P. 1600E1
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3458

Dear Mr. Glist,

In a February 3, 1995 letter, you advised the Commission that your client, Greater Media, Inc. has settled its complaint in *Greater Media, Inc., et al. v. New England Telephone and Telegraph Co.*, File No. PA 91-0010. In accordance with your letter, that complaint is hereby dismissed.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

cc: New England Telephone and Telegraph Company

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 23, 1995

## PLEADING CYCLE ESTABLISHED ON NCTA'S PETITION FOR RECONSIDERATION, CLARIFICATION AND INVESTIGATION OF US WEST'S AUTHORIZATION FOR VIDEO DIALTONE TRIAL OMAHA, NEBRASKA

W-P-C- 6868

On February 6, 1995, the National Cable Television Association (NCTA) petitioned the Commission for reconsideration of the Commission's Order and Authorization granting US West's request to modify its video dialtone trial (*Order and Authorization*, FCC 94-350, released January 6, 1995). NCTA argues that US West has arranged to limit the offering of capacity to particular programmers prior to the filing of a tariff. NCTA states that it is seeking assurances from the Commission that the tariff review process will be used to ensure that US West is providing nondiscriminatory access to the video dialtone platform. NCTA requests that the Commission direct US West to clarify that it will file a tariff for its Omaha trial that will establish an open enrollment period and process during which programmers may request capacity pursuant to the tariff.

In addition, NCTA asks the Commission to investigate reported action of US West. Specifically, NCTA argues that US West's allocation plan may violate the nondiscrimination requirement in the Communications Act and the terms of the Commission's authorization.

Oppositions to this Petition must be filed by **March 6, 1995**, and Replies to an Opposition must be filed by **March 15, 1995**. Interested parties should file an original and four copies with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C., to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and to the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C. 20554.

Copies of the Petition can be obtained from ITS at (202)857-3800. The Petition also is available for review and photocopying at the FCC Public Reference Room from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 23, 1995**

**PLEADING CYCLE ESTABLISHED ON GLCC'S PETITION FOR RECONSIDERATION OF ORDER AND AUTHORIZATION GRANTING AMERITECH'S AUTHORITY TO PROVIDE VIDEO DIALTONE SERVICE**

**W-P-C- NOS. 6926, 6927, 6928, 6929, 6930**

On February 3, 1995 Great Lakes Cable Coalition (GLCC) petitioned the Commission for reconsideration of the Commission's Order and Authorization granting Ameritech authority to provide video dialtone service in multiple locations in its telephone service area. (*See Order and Authorization*, FCC 94-340, released January 4, 1995).

GLCC requests that the Commission rescind its order and authorization until Ameritech's local exchange monopoly is opened to competition. In the alternative, GLCC argues that the Commission should amend its decision to clarify certain sections of the order. In particular, GLCC argues that the Commission should include in its ordering clause a requirement that Ameritech provide a minimum of 390 channels of capacity. GLCC also argues that the Commission should clarify that Ameritech is prohibited from undertaking any channel sharing scheme under its authorization. GLCC further argues that the ordering clauses in Ameritech's authorization should expressly prohibit Ameritech from providing programming over its system, either directly or through an affiliate. Finally, GLCC argues that the Commission should clarify its position on the relevance of comparisons with traditional cable data as support for the reasonableness of Ameritech's economic justification analyses.

Oppositions to this Petition must be filed by **March 6, 1995**, and Replies to an Opposition must be filed by **March 15, 1995**. Interested parties should file an original and four copies with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C., to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and to the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C. 20554.

Copies of the Petition can be obtained from ITS at (202)857-3800. The Petition also is available for review and photocopying at the FCC Public Reference Room from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 23, 1995**

## PLEADING CYCLE ESTABLISHED FOR COMMENTS AND REPLIES ON ITAA'S PETITION FOR RECONSIDERATION OF INTERIM WAIVER FOR BOC'S PROVISION OF ENHANCED SERVICES

On February 10, 1995, the Information Technology Association of America (ITAA) petitioned the Commission for reconsideration of the Common Carrier Bureau's Order, *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, MO&O, DA 95-36 (Com. Car. Bur., January 11, 1995) (*Waiver Order*). In the *Waiver Order*, the Bureau authorized the Bell Operating Companies (BOCs) to provide, on an interim basis, enhanced services on an integrated basis subject to certain restrictions in light of the recent court decision from the United States Court of Appeals for the Ninth Circuit, *California* v. *FCC*, 39 F.3d 919 (9th Cir. 1994), which vacated the *BOC Safeguards Order*.

ITAA states that under the regulatory regime adopted in *Computer II*, the BOCs were required to offer enhanced services through fully separate subsidiaries. ITAA states that in *Computer III*, the Commission allowed the BOCs to offer enhanced services on an integrated basis, provided that the BOCs implemented satisfactory Open Network Architecture plans. ITAA argues that the *California III* decision vacated the *Computer III* rules, and that the Bureau should evaluate the BOCs' waiver request under the *Computer II* requirements.

Oppositions to this Petition must be filed by **March 6, 1995**, and Replies to an Opposition must be filed by **March 15, 1995**. Interested parties should file an original and four copies with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C., and to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Copies of the Petition can be obtained from ITS at (202) 857-3800. The Petition also is available for review and photocopying at the Common Carrier Bureau, Policy Division, Room 544, from 9:00-12:00 and 1:30-4:30, Monday through Friday.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**Gen Docket No. 89-97**

In the Matter of

Southern California Public
Safety Plan

**ORDER**

**Adopted: February 28, 1995; Released: March 13, 1995**

By the Acting Chief, Private Radio Division, Wireless Telecommunications Bureau and the Acting Chief, Spectrum Engineering Division, Office of Engineering and Technology:

1. By letter dated August 1, 1994, Region 5 (Southern California) proposed to amend the Region 5 Public Safety Plan that was accepted under delegated authority, by the Commission on November 8, 1989, 4 FCC Rcd 8352 (1989). The proposed amendment would revise the current channel allotments.

2. On October 5, 1994, the Commission placed the letter on Public Notice with comments due on November 4, 1994, 59 FR 50761 (1994). On November 3, 1994, Region 27 (Nevada) filed a request to extend the comment period. The comment period was extended until November 25, 1994; however, no further comments were filed.

3. We have reviewed the proposed amendment to the Region 5 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Region 5 IS AMENDED, as set forth in the Region's letter of August 1, 1994. This Amendment is effective immediately.

5. For further information, contact Deborah Behlin at (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Acting Chief, Private Radio Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering Division

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GEOCOMM CORPORATION — File No. I-T-C-94-112

Application for authority to resell international private line communications services between the United States and Mexico.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: March 3, 1995; Released: March 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-112 IS GRANTED IN PART, and GeoComm Corporation (GeoComm) is authorized to lease and operate up to two DS-3 equivalent circuits from authorized U.S. common carriers for the provision of non-interconnected international private line services between the United States and Mexico.

3. IT IS FURTHER ORDERED that the request by GeoComm to provide facilities-based private line services between the United States and Mexico is hereby deferred.

4. IT IS FURTHER ORDERED that neither GeoComm nor any persons or companies directly or indirectly controlling or controlled by GeoComm, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which GeoComm or any persons or companies controlling or controlled by GeoComm are parties.

5. IT IS FURTHER ORDERED that our authorization of GeoComm to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Mexico -- that is, private lines which originate in the United States and terminate in Mexico or which originate in Mexico and terminate in the United States. In addition, GeoComm may not -- and GeoComm's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Mexico affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Mattter of

BROADCAST MEDIA SATELLITE, INC. File No. I-T-C-93-326

Application for authority to acquire and operate satellite facilities for service between Puerto Rico and various overseas points.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: March 3, 1995; Released: March 13, 1995**

By the Chief, Telecommunications, Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-326 IS GRANTED, and Broadcast Media Satellite, Inc. (BMSI) is authorized to:

a. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix A, between BMSI's earth station in Puerto Rico and the PAS-1 satellite, connecting with similar circuits between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

b. establish channels of communications between BMSI's Puerto Rico earth station and U.S. domestic satellites (also Morelos satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix B;

c. lease and operate necessary connecting facilities in Puerto Rico;

d. lease a one-half interest in and operate necessary overseas connecting facilities; and

e. use the facilities in a, c, and d, above, to provide BMSI's regularly authorized services, including switched voice and data and private line services, between Puerto Rico and the points listed in Appendix A.

3. IT IS FURTHER ORDERED that our authorization of BMSI to provide private lines as part of its authorized services is limited to the provision of such private lines only between Puerto Rico and the countries listed in Appendix A -- that is, private lines which originate in Puerto Rico and terminate in one of the countries listed in Appendix A or which originate in one of the countries listed in Appendix A and terminate in Puerto Rico. In addition, BMSI may not -- and BMSI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the Puerto Rico or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither BMSI nor any persons or companies directly or indirectly controlling or controlled by BMSI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from Puerto Rico which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which BMSI or any persons or companies controlling or controlled by BMSI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1 satellite.

10. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

11. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A
COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)
UP TO TWO 64-KBPS VOICE-GRADE CIRCUITS EACH

Anguilla
Antigua
Argentina
Aruba
Austria
Bahamas
Barbados
Barbuda
Belgium
Belize
Bermuda
Bolivia
Bosnia
Brazil
British Virgin Islands
Canada
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
El Salvador
Finland
France
French Guiana
Germany
Greece
Greenland
Grenada
Guadalupe
Guatemala
Guyanas
Haiti
Honduras
Iceland
Italy
Jamaica
Leeward Islands
Luxembourg
Martinique
Mexico
Monserrat
Netherlands
Netherlands Antilles
Nicaragua
Norway
Panama
Paraguay
Peru
Portugal
Spain
St. Kitts & Nevis
St. Lucia
St. Martin
St. Vincent & Grenadines
Suriname
Sweden
Switzerland
Trinidad and Tobago
Turks & Caicos
United Kingdom
Uruguay
Venezuela
Windward islands

## APPENDIX B
## COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES AND MEXICAN MORELOS SATELLITES

| | |
|---|---|
| Anguilla | Domestic Satellites |
| Antigua and Barbuda | Domestic Satellites |
| Bahamas | Domestic Satellites |
| Barbados | Domestic Satellites |
| Belize | Domestic Satellites |
| Bermuda | Domestic Satellites |
| British Virgin Islands | Domestic Satellites |
| Canada | Domestic Satellites |
| Cayman Island | Domestic Satellites |
| Dominica | Domestic Satellites |
| Grenada | Domestic Satellites |
| Grenadines | Domestic Satellites |
| Mexico | Domestic Satellites, Morelos |
| Montserrat | Domestic Satellites |
| Netherlands Antilles | Domestic Satellites |
| St. Kitts-Nevis | Domestic Satellites |
| St. Lucia | Domestic Satellites |
| St. Vincent | Domestic Satellites |
| Turks & Caicos | Domestic Satellites |
| Venezuela | Domestic Satellites |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP. File No. I-T-C-95-071

Application for authority
to convey capacity in the
TPC-4 Cable System.

**ORDER AND AUTHORIZATION**

**Adopted: March 2, 1995; Released: March 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-071 IS GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. convey to Cellular Communications Network Sdn. Bhd on an Indefeasible Right of User (IRU) basis a one-half interest in one MIU[1] of capacity in subsegments B1 and B2 of the TPC-4 Cable System between California and Japan; and

b. convey to Mercury Communications Ltd. on an IRU basis a one-half interest in one MIU of capacity in subsegments B1 and B2 of the TPC-4 Cable System between California and Japan.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A MIU is a unit designated as the minimum unit of investment in the TPC-4 Cable System, allowing the use of 2.048 Mbps and the additional 162,539.68 bps required for multiplexing in each direction.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

D.C. CORPORATION File No. I-T-C-95-051

Application for authority to acquire and operate facilities for service between the U.S. and the Dominican Republic.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: March 2, 1995; Released: March 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Dominican Republic by D.C. Corporation (DCC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-051 IS GRANTED and DCC is authorized to:

a. lease from Comsat and operate one 1.544 Mbps satellite circuit between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in the Dominican Republic furnished by DCC's correspondent in the Dominican Republic;

b. lease and operate one 1.544 Mbps circuit in the appropriately licensed U.S. earth station to be used in conjunction with the satellite space segment capacity;

c. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate one 1.544 Mbps circuit in the AMERICAS-1 cable between the U.S. mainland and St. Thomas, U.S. Virgin Islands;

d. acquire on an IRU basis a one-half interest in and operate one 1.544 Mbps circuit in the TAINO-CARIB Cable between St. Thomas and Puerto Rico;

e. acquire by IRU a one-half interest in and operate one 1.544 Mbps circuit in the LA MONA 1 Microwave System between Puerto Rico and the Dominican Republic;

f. lease and operate any necessary domestic connecting facilities; and

g. use said facilities to provide DCC's regularly authorized services, including switched voice and data and private line services, between the United States and the Dominican Republic.

3. IT IS FURTHER ORDERED that our authorization of DCC to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the Dominican Republic – that is, private lines which originate in the United States and terminate in the Dominican Republic or which originate in the Dominican Republic and terminate in the United States. In addition, DCC may not – and DCC's tariff must state that its customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. or the Dominican Republic end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the Dominican Republic affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither DCC nor any persons or companies directly or indirectly controlling or controlled by DCC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which DCC or any persons or companies controlling or controlled by DCC are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a copy of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ST. THOMAS AND SAN JUAN TELEPHONE COMPANY — File No. I-T-C-95-085

Application for authority to acquire and operate facilities for provision of communications services between the United States and various overseas points.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: March 2, 1995; Released: March 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-085 IS GRANTED, and St. Thomas and San Juan Telephone Company (STSJ) is authorized to:

a. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

b. lease and operate facilities in the appropriately licensed U.S. earth stations, to be used in conjunction with the satellite space segment capacity;

c. acquire on an Indefeasible Right of User basis a one-half interest in and operate the cable circuits listed in Appendix B;

d. lease and operate necessary connecting facilities in the United States;

e. lease a one-half interest in and operate any necessary overseas connecting facilities; and

f. use the facilities authorized in a, b, c, d, and e, above to provide STSJ's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A and B.

3. IT IS FURTHER ORDERED that neither STSJ nor any persons or companies directly or indirectly controlling or controlled by STSJ, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which STSJ or any persons or companies controlling or controlled by STSJ are parties.

4. IT IS FURTHER ORDERED that our authorization of STSJ to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, STSJ may not -- and STSJ's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service over the PTAT-1 cable system.

9. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## APPENDIX A
## COUNTRIES TO BE SERVED VIA INTELSAT

| Country | No. of 64-kbps circuits |
|---|---|
| Belize | 5 |
| Cayman Islands | 5 |
| Guyana | 5 |
| Suriname | 5 |

## APPENDIX B
## COUNTRIES TO BE SERVED VIA CABLE

| Country | No. of 64-kbps circuits | Facility |
|---|---|---|
| Argentina | 15 | AMERICAS-1, UNISOR |
| Bermuda | 12 | PTAT-1 |
| Chile | 5 | AMERICAS-1, UNISOR |
| Costa Rica | 15 | COLUMBUS-2 |
| Ecuador | 15 | TCS-1, COLOMBIA |
| El Salvador | 10 | COLUMBUS-2 |
| French Guiana | 5 | TAINO-CARIB, DECMS |
| Guatemala | 10 | COLUMBUS-2 |
| Honduras | 5 | COLUMBUS-2 |
| St. Kitts & Nevis | 5 | TAINO-CARIB, DECMS |
| Nicaragua | 10 | COLUMBUS-2 |
| Paraguay | 5 | AMERICAS-1, UNISOR |
| Peru | 10 | TCS-1, ASETA |
| Uruguay | 5 | AMERICAS-1, UNISOR |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP. File No. I-T-C-95-098

Application for authority to
modify its ownership in the
the AMERICAS-1 Cable System.

**ORDER AND AUTHORIZATION**

**Adopted: March 2, 1995; Released: March 13, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-098 IS GRANTED, and AT&T Corp. (AT&T) is authorized to modify its ownership in the AMERICAS-1 Cable System, in accordance with the updated ownership schedule dated October 17, 1994 and the AMERICAS-1 Cable System C&MA, as follows:

| SEGMENT | ORIGINAL OWNERSHIP (jointly-owned) | PROPOSED OWNERSHIP (jointly-owned) |
|---|---|---|
| Florida-St. Thomas | 335 | 327 |
| St. Thomas-BU1 | 195 | 188 |
| BU1-Trinidad | 119 | 113 |
| Trinidad-Venezuela | 71 | 63 |
| BU1-Brazil | 98 | 99 |

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MA for the AMERICAS-1, as well as any Commission Order granting authority to acquire and operate facilities in the AMERICAS-1 Cable System.

4. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Arch Capitol District, Inc.
Complainant,

v. File No. WB/ENF-F-95-002

Professional Communications,
Inc.
Defendant

**ORDER**

**Adopted: March 3, 1995; Released: March 14, 1995**

By the Chief, Enforcement Division, Wireless Telecommunications Bureau:

1. On December 27, 1994, Arch Capitol District, Inc ("Arch") filed the above-captioned formal complaint against Professional Communications, Inc. ("ProCom"). The complainant alleged that ProCom had unreasonably restricted services to Arch's customers in violation of Sections 201(a), 201(b) and 202(a) of the Communications Act and Section 22.514 of the Commission's Rules.

2. On February 15, 1995, Arch filed a pleading titled, "Dismissal Of Formal Complaint", in which it asserts that the parties hereto have agreed upon a settlement resolving this dispute as well as other litigation between them. Arch asserts that the settlement will resolve the service problems which are the subject of its complaint herein. Arch purports to dismiss its complaint, contingent upon the Commission's grant of certain applications in related proceeding subject to the settlement agreement.[1] In light of its evident purpose, we will treat Arch's instant pleading as a motion to dismiss.

3. We are satisfied that the dismissal of the complaint and the termination of this proceeding will serve the public interest by eliminating the need for further litigation and expenditure of further time and resources of the parties and the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, that complainant's motions IS GRANTED.

5. IT IS FURTHER ORDERED that, pursuant to complainant's request, the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard C. Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

[1] Arch requests that the dismissal of its complaint be contingent on the grant of the applications in File Nos. 22851-CD-TC-95 and 22853-CD-TC-95 and in File No. 23427-CD-MP-95. These applications have now been granted by the Commercial Radio Division.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-204**

In re Applications of

| | |
|---|---|
| CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT | File No. BRED-900131UA |
| For Renewal of License of Station KUCB-FM Des Moines, Iowa | |
| and | |
| IOWA ACORN BROADCASTING CORPORATION | File No. BPED-900102MB |
| MINORITY COMMUNICATIONS, INC. | File No. BPED-900116MA |
| For a Construction Permit for a New FM Station Des Moines, Iowa | |

**Appearances**

*Alfredo Parrish, Esq.*, and *Elizabeth Kruidenier, Esq.*, for Center for Study and Application of Black Economic Development; *Steve Bachmann, Esq.*, for Iowa Acorn Broadcasting Corporation; *Mark E. Fields, Esq.*, for Minority Communications, Inc.; *Charles E. Dziedzic, Esq., Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.*, for the Chief, Mass Media Bureau.

**DECISION**

**Adopted: February 27, 1995; Released: March 17, 1995**

By the Review Board: MARINO (Chairman) and GREENE. Board Member GREENE issuing a Statement.

Board Chairman MARINO:

1. Following a trial-type hearing, Administrative Law Judge Richard L. Sippel (ALJ) granted the construction permit application of Minority Communications, Inc. (Minority) for a new noncommercial educational FM station at Des Moines, Iowa. *See Initial Decision*, 8 FCC Rcd 2116 (1993). The renewal application of Center for Study and Application of Black Economic Development (Center), licensee of noncommercial educational Station KUCB-FM, Des Moines, Iowa, and the application of Iowa Acorn Broadcasting Corporation (Acorn) were denied by the ALJ. Center was disqualified for "intentional misrepresentation" of material facts in its renewal application, false testimony "given in open court" at the hearing, and taking Station KUCB-FM off the air for two years without Commission knowledge or authorization. Acorn was disqualified for being financially unqualified. Exceptions to the *Initial Decision* (*I.D.*) have been filed by Center and Acorn challenging their respective disqualifications, and by Minority and the Mass Media Bureau urging additional grounds for Center's disqualification. Oral argument was not requested by any of the parties. The decisional issues presented on appeal are: (a) whether Center lacks the requisite character qualifications because it did not satisfy the high standard of candor required of a broadcast licensee, *see, e.g., Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1221-1223 (D.C. Cir. 1994); and, (b) whether Acorn has failed to establish that it is financially qualified to construct and operate a new FM station, *see CHM Broadcasting Ltd. v. FCC*, 24 F.3d 1453, 1455, 1457 (D.C. Cir. 1994). Based on our own review of the factual record, in the light shed by the written arguments of the adversaries, we affirm the ALJ's denial of Center's license renewal and Acorn's application, and his grant of Minority's application for a new station.

**CENTER'S CANDOR**

2. *Background:* Center's renewal application and related ownership report were filed with the Commission on January 31, 1990. These documents appeared to the Commission to have been completed, signed, and filed by Jamal Long, who was listed as "Vice-President." *Hearing Designation Order* (*HDO*), 6 FCC Rcd 4622, 4623 ¶ 12 (1991). Question 6 of Center's renewal application asked whether any adverse finding had been made against "the applicant or any of its parties" in any "criminal proceeding" involving "any felony" since the filing of its last major application. Despite the "no" response in Center's renewal application, the Commission recited, in its *HDO* at ¶ 12, that information had come to its attention that:

> Charles Knox, who is listed in the renewal application as the Center's 'President,' was convicted in 1987 in the United States District Court for the Western District of Texas of two felony counts... . Also, Knox was convicted in 198[9] in the United States District Court for the Northern District of Illinois of three felony counts... . None of these convictions was disclosed by the Center to the Commission.

Therefore, the Commission specified a basic qualifying issue:

> To determine whether [Center] misrepresented material facts to, and/or concealed material facts from, the Commission in connection with its answer to Question 6 of its instant license renewal application.

*Id.* at ¶ 16. After he had heard the evidence on this issue, the ALJ held first, that Center intentionally misrepresented when it responded to Question 6 in the renewal application, *I.D.*, ¶ 98; and, second, that this misconduct was aggravated when at the hearing Center's Vice-President and

board member Jamal Long, and other witnesses, attempted to cover up incriminating circumstances. *Id.* at ¶ ¶ 53 and 103.

3. On the first point, the ALJ found it was undisputed that, before the renewal application was filed, Charles Knox had been convicted of several felonies in 1987 and 1989; that Charles Knox was identified as Center's President in the 1987, 1988, and 1990 ownership reports; that Knox prepared the 1990 renewal application, and the accompanying ownership report; and that Knox signed Jamal Long's name to those documents and mailed them to the FCC. *I.D.*, at ¶ ¶ 49-50, 55. From "the totality of the circumstantial evidence," the ALJ concluded that: "certainly Knox knew... he had multiple felony convictions that were required to be disclosed in Question 6" of the renewal application; and that "Long knew that Knox had the two felony convictions when Center prepared and filed its renewal application in January of 1990." *I.D.*, ¶ 98.

4. In his second major conclusion, the ALJ held that the "candorless testimony in open court" at the evidentiary hearing, taken together with Knox's misrepresentation in Question 6 of Center's renewal application, made this an even stronger case for denying license renewal. *Id.* at ¶ 103. He found: (a) "Long [a Center director and vice-president] had misrepresented that he had prepared the renewal application and that he had signed his name"; (b) "Long also attempted by his false testimony to create an appearance that Knox had withdrawn from his position as director and officer of Center" at the time of the 1990 renewal filings, and of the ownership reports of May 1987 and April 1988; (c) Knox "misrepresented in his testimony the status of his resignation in order to avoid an adverse finding against Center with respect to Knox's convictions"; (d) "Samad [a Center director and station manager] also testified falsely that the board of directors decided in 1989 to remove Knox"; and (e) "Long and Samad ... testified falsely that they had no knowledge of Knox's convictions until after January 1990." *Id.* at ¶ ¶ 101- 102. Accordingly, the ALJ held that (*id.* at ¶ 103):

> The fact that the misrepresentation in Question 6 was intentional rather than a rushed mistake is further established by the continuing misrepresentations in the testimony of Long and Knox.... An applicant may be disqualified on the basis of its principals' candorless testimony in open court and the issue need not be specifically designated as a hearing issue because "truth and candor are always in issue." *Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713, 719 (Rev. Bd. 1983), citing *RKO General, Inc. v. F.C.C.*, 670 F.2d 215, 234 (D.C. Cir. 1981). Certainly the affirmative misrepresentation in the renewal application when considered with the additional misrepresentations of the principals at the hearing makes an even stronger case for denying Center's renewal.

5. *Center's Exceptions.* Center contends that the ALJ "improperly" resolved the misrepresentation issue because "there was nothing in the evidence presented which would indicate that [it] misrepresented material facts, and/or concealed material facts from the Commission." Center's Br. at 19. It disputes the ALJ's finding that its board members had knowledge of Knox's felony convictions when preparing the renewal application and argues that the ALJ misunderstood the record testimony concerning Knox's signing of Jamal Long's name on the renewal application. *Id* . at 19-20. Center asserts there was "absolutely nothing to be gained by including Dr. Knox's name on the application" and that the evidence shows "once the knowledge of the convictions of Dr. Knox became known [after his renewal application was filed in January of 1990], a prime objective was to openly accept the resignation of Knox and to exclude his name from any further actions taken by Center or KUCB. It was due to the lack of information regarding his convictions and the uncertainty of his capacity within the organization by some officers that erroneous information appeared in Center's application for renewal." *Id.* at 21. Both the Bureau and Minority support the ALJ's resolution of the misrepresentation and candor issues; they have filed exceptions urging additional grounds for Center's disqualification. Thus, the Bureau contends that the ALJ should also have disqualified Center on an ineptness issue and the effects of Charles Knox's criminal convictions on Center's basic qualifications. Minority argues that Center should have also been disqualified on the unauthorized transfer of control issue. *See I.D.*, ¶ 2 for designated issues. We need not reach these exceptions because we have concluded that the ALJ's disqualification of Center on the more critical issue of candor is firmly supported by the record evidence and decisional.

6. *Discussion:* In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1231-32 (1989), the Commission indicated that the fundamental purpose of the character inquiry about an applicant's qualifications is "to make a predictive judgment relating to the applicant's propensity to deal honestly with the Commission and to comply with [its] rules and policies." *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985); *KQED, Inc.*, 3 FCC Rcd 2821, 2826-27 at ¶ ¶ 24-25 (Rev. Bd. 1988) (denial of non-commercial license renewal for misrepresentations) (subsequent history omitted). Misrepresentations or omissions at hearing can, by themselves, result in disqualification. *See Swan Creek*, 39 F.3d at 1222, *quoting from Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983). Complete candor is essential. "If the Commission cannot believe and rely on what applicants and licensees tell it, it cannot maintain the integrity of its processes." *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571, 8573 (Rev. Bd. 1992), because of the Commission's exceedingly limited budget and staff compared with the enormous industries and thousands of licensees under its purview. *Id.* at 8573 n.7 .

7. The Board has reviewed the record regarding Center's misrepresentation and lack of candor "in open court" with special care and due deliberation, as requested by Center, *see* Center Br. at 26, and mandated by the Commission. *Nancy Naleszkiewicz*, FCC 95-33, at ¶ 4, released February 3, 1995. Our review was based primarily on Center's exceptions, its proposed findings of fact, its contemporaneous documents filed with the Commission during 1987-1990, and the testimony of Jamal Long, Charles Knox, and Ako Abdul-Samad. We have reached two separate and independent conclusions. First, we hold that substantial record evidence supports the ALJ's finding that Center's "no" response to Question 6 of the renewal application denying Knox's felony convictions was a misrepresentation. Second, and even more serious, is our conclusion that the record fully supports the ALJ's findings about a "cover up" and the giving of candorless testimony by Center's witnesses at the hearing. Thus, Center has breached the fundamental requirement that complete candor is demanded of "Commission licensees as to matters under investigation."

*Grenco, Inc.*, 39 FCC 2d 732, 736 (1973), cited with approval by the Commission and the court in *Richardson Broadcast Group*, 7 FCC Rcd 1583, 1585 (1992), *aff'd by judgement*, 995 F.2d 306 (D.C. 1993); *Swan Creek*, 39 F.3d at 1222-1223 (applicant in testimony "acted less than honestly").

8. There is no dispute among the parties that Knox was convicted in 1987 in a Texas Federal District Court on two felony counts of impersonating an attorney in violation of Federal Law, and in 1989 in an Illinois Federal Court on three counts of conspiracy, racketeering, and embezzlement. Bureau Exhs. 15-18. The embezzlement count involved funds from the National Telecommunications and Information Administration intended for Station KUCB-FM. Bureau Exh. 17 at 4-5. Defendant Knox's Plea Agreement recited that:

> the defendant on behalf of KUCB in Des Moines, Iowa received $72,484 from the Department of Commerce pursuant to a grant from the National Telecommunications and Information Administration (NTIA). As defendant knew and understood, the grant money was supposed to be used to purchase radio equipment to operate a minority-run radio station. Instead the defendant knowingly diverted at least $31,181.15 to a company called Burns Associates, South Chicago Auto Sales, for purposes other than radio equipment. The defendant completed this conversion of government funds by causing the $31,181.15 to be delivered to Burns and Associates in Chicago, Illinois. The money was delivered in the form of six checks signed by the defendant during the period from February, 1985 to March, 1986. Although quarterly reports of how the money was spent are required by NTIA, Knox never filed any such reports.

9. Center's ownership report dated January 22, 1990, which accompanied the renewal application, listed Charles Knox as Center's President. Bureau Exh. 12, at 4-5. Knox prepared this report, albeit signing Jamal Long's name and certification, and revised his address from earlier ownership reports, dated May 23, 1987, and April 12, 1988, which had also identified him as Center's President. Bureau Exh. 1 at 87-90. Knox testified that he had tendered a resignation by telephone in 1987, by letter in 1989, and had been asked to resign in 1989, when Wayne Ford was elected President of the board of directors, allegedly in the winter of 1989. Tr. 1397-1398, 1416-1418. We agree with the ALJ that this testimony is not credible in light of Center's ownership documents filed with the Commission and Knox's admission on cross-examination that he had filled in the ownership form listing the names and addresses of the officers including his own. Tr. 1415-16. The alleged 1989 written resignation was never produced by Center, which was permitted by the ALJ to adduce all mitigating evidence, nor was Wayne Ford called to corroborate testimony that he was elected president in 1989 and then asked Knox to resign before the renewal filings. On March 15, 1990, Ford did file a fourth ownership report with the Commission which, for the first time, replaced Knox's name with Ford as President. Bureau Exh. 1 at 91-92. That report was certified by Ford on the 9th of March 1990, and further recited that: "All of the information furnished is reported as of February 10, 1990." *Id.* Late in his cross-examination, Knox conceded that: "It could have been 1990" [that the new Board was elected and he was asked to resign], "I am not sure," *see* Tr. 1417, and that, after the filing of Center's renewal application and his "resignation," he has travelled to Des Moines "a couple of times" and "was at the station" and that the KUCB Board continues to seek his advice "not necessarily on the operations, but on the technical portion." Tr. 1418.

10. Since Knox's ultimately admitted that he prepared Center's renewal application and ownership report, signed Long's name, and mailed them to the Commission from Chicago, we do not rely on the ALJ's finding, para. 4(e) above, that Long and Samad knew of the convictions when the renewal application was filed, inasmuch as Long was not the individual who prepared or signed the application, and our *Decision* does not rest on that finding. Nevertheless, based upon Center's own documents, which were not adequately explained by Center's contradictory oral testimony, we conclude, as did the ALJ, that Knox was a party to the renewal application and ownership reports that he prepared and filed in January of 1990, and that Knox was aware of his own prior felony convictions. Thus, we will affirm the ALJ's initial conclusion that: "Knox, while acting as agent for Center, knowingly misrepresented when he checked ... a 'No' response to Question 6 ... . The motive to so misrepresent was in order to knowingly conceal the fact of criminal convictions from the Commission which, if disclosed, would adversely reflect on Center's character." *I.D.*, ¶ 98.

11. Second, and fatal to Center's renewal application, is our affirmance of the ALJ's finding about the "cover up" by Center's witnesses, especially Long's failure to disclose Knox's role in the preparation of Center's renewal application and ownership report, and the other evasive and candorless testimony by the Center witnesses regarding the claim that Knox resigned or was asked to resign prior to the filing of the renewal application. Initially, we focus on Center's argument that the ALJ:

> misunderstood the testimony concerning who signed Jamal Long's name on Center's renewal application.... Jamal Long testified that the signature was his. However, he did not testify that he had personally signed his signature; in fact, both he and Charles Knox consistently testified that Charles Knox signed Long's name on the renewal application for 1990.

Center's Br. at 20-21.[1]

12. The record contradicts Center's contention, and supports the ALJ's findings. Our review of Long's testimony indicates that Long: (a) never revealed that Knox had prepared the renewal application, and related ownership report; (b) never indicated that Knox had signed Long's name; and (c) never indicated that Knox had mailed those

[1] The admission that Long did not sign his name, if it stood alone, would establish a technical violation of the Commission's signature rule, and require a remedial amendment. *See KQED*, 3 FCC Rcd at 2831-2832.

documents to the Commission. On the contrary, in response to questions from Center's own counsel, Long testified "I filled out the application," Tr. 954, and answered "no" when asked if he had any significant contacts with Knox at the time the renewal application was prepared. Tr. 955. Long also testified that he "was trying to rush" because he "knew that the deadline was close" and that he made sure that the application was filed on time. *See* Tr. 956-957, reproduced below (emphases added):

> Q. Mr. Long, on that date [when the renewal application was signed], were you aware that Mr. Knox had a conviction of a felony crime, to your best recollection?
>
> A. No, I did not.
>
> Q. Had you been in significant contact with Mr. Knox at that point at the time you filled out your application for renewal?
>
> A. No.
>
> Q. Tell us how did you know even to file a renewal of your license?
>
> A. We had got a reply about the deadline and *I was trying* to rush to really get that in because *I knew* the deadline was coming close upon us. And that was *my concern, to make sure we got that in on time.*
>
> Q. And did *you* do that?
>
> A. Yes.
>
> [CENTER'S COUNSEL]: Your Honor, I don't think I have any further questions at this time of this Witness.

13. On cross-examination, Long continued to deny that Knox had any involvement with Center at renewal time and did not disclose that Knox had prepared the renewal application and ownership report, signed Long's name, and filed them with the Commission. In his testimony, Long repeated over and over: "I sent the ownership report in"; "I sent it in"; "I got it in on time"; "I sent the form in"; "I didn't remove people"; "I didn't remove their names"; "I didn't take any names off"; "I didn't take any names off at that time"; "there was names I didn't take off." And, finally, when shown the signature on the report and asked if it was his, he replied "Yes," but failed to indicate that, in fact, Knox had signed his name. *See* Tr. 995-996 and 997, 998, 999 reproduced below (emphases added):

> Q. Yes. Was Mr. Knox involved in Center as recently as January 1990?
>
> A. No.
>
> Q. Can you explain why this ownership report shows that Mr. Knox is President of Center in January 1990?
>
> A. Lots of times when we sent -- when *I sent the ownership report in*, we -- in the times *I sent it in*, we didn't remove -- *I didn't remove* people that had been -- was no longer with the Center. *I didn't remove* their names, because when you do the ownership report, to add some people in, you always remove some people.
>
> So these times *I did not take any names off*. That was because *I was in a hurry* to make sure that *I got them in on time*. And so *I didn't take any names off at that time*. They have a list, a column where you add names and you take names off.
>
> * * *

Tr. 995-96.

> Q. In other words, Mr. Knox was President of Center in 1990.
>
> A. *I said when I sent the form in, there was names that I didn't remove.*
>
> Q. Mr. Long, this ownership report that was signed on January 22, 1990, on the second page of that ownership report, it shows that Charles Knox is President of Center.
>
> My question to you is was Charles Knox President of Center on that date?
>
> A. No.
>
> Q. Mr. Long, is that *your signature* on the second page of the ownership report?
>
> A. Yes.
>
> * * *

Tr. 997.

> Q. Is that your signature on the second page of the ownership report [dated April 12, 1988], which is labeled Page 88?
>
> A. Yes.
>
> Q. Was Mr. Knox President of Center in April -- on April 12, 1988?
>
> A. No.
>
> * * *

Tr. 998.

> Q. Would you let me know when you're finished looking at that ownership report [dated May 23, 1987]?
>
> A. Yes, I'm through.
>
> Q. Mr. Long, on May 23, 1987, was Charles Knox President of the Center?
>
> A. No.

Tr. 999.

14. In his testimony quoted above, Long misrepresented and lacked candor when he failed to disclose Knox's role in the preparation of Center's renewal application and ownership report. Long's attempt to "cover up incriminating information" about Knox's significant role in the renewal filings, as the ALJ correctly found, *see I.D.*, ¶ 53, was only a part of Center's attempt to create the false impression that Knox had withdrawn from his position as Center's President before the renewal filing, and that Center's board of directors had also decided late in 1989 to remove Knox. *Id.* at ¶ 98. Center responds that "there was some confusion as to exactly when Charles Knox ceased his participation with KUCB." Br. at 19-20. Center essentially urges that "lack of information" about Knox's convictions, and "uncertainty about his capacity within the organization by some officers" explains why "erroneous information appeared in Center's application for renewal." *Id.* p. 21.

15. Center's contention is contradicted by the record and especially Knox's reluctant admission that he prepared the renewal application and ownership report. Moreover, Center's own contemporaneous documents, *see* para. 9 above, and the inconsistent and contradictory testimony of Long, Knox, and Samad demonstrate that the ALJ was completely justified in finding that Center's witnesses attempted to conceal Knox's significant role in the preparation of the renewal filings, and attempted to create the false appearance that Knox had withdrawn from his position as Center's President prior to the filing of the renewal application in January of 1990.

16. With respect to the contradictory testimony, Long answered in response to another direct question from Center's counsel about the last time that Dr. Knox was involved with the station: "I think it was around the early 80's." Tr. 889. On cross-examination, Long responded on three different occasions that he was: "not sure about the date." Tr. 994. However, after being shown the three ownership reports dated January 22, 1990, April 12, 1988, and May 23, 1987, which listed Charles Knox as Center's President, Long gave a flat "no" each time when asked if Knox was President at those times. *See* Tr. 997-999, reproduced at ¶ 13, above. Long's claim that Knox was not an officer at the time of the 1987 and 1988 ownership reports was impeached by Knox's own testimony that he was on the board from "1985, to resignation, in 1989," (Tr. 1397-1399) and Samad's testimony that, in late 1989, Knox was asked by the newly elected board to resign (Tr. 1119-1120; tr. 1150); *see also* Tr. 1135-1136.

17. The record supports the ALJ's additional finding that Knox "misrepresented the status of his resignation in order to avoid an adverse finding against Center with respect to Knox's conviction." *I.D.*, ¶ 98. The 1987, 1988, and 1990 ownership reports all listed Knox as Center's President, see para. 9 above. In his testimony, Knox first attempted to create the impression that it was Long who had listed his name in the January 1990 ownership report (*see* Tr. 1394-1395 and 1413-1414). However, he was finally forced to admit near the end of his cross-examination that the handwriting on the ownership form was his, and that he filled in the part of the ownership form listing the names and addresses of the officers including his own name. Tr. 1415-1416. Like the ALJ, we find an irreconcilable conflict between Knox's testimony that he attempted to resign and had been asked to resign prior to the filing of the renewal application, and the Commission records, especially the January 1990 ownership report where Knox in his own handwriting identified himself as Center's President and revised his own address. *See Swan Creek*, 39 Fd. 3d at 1222-1223 ("Board could properly make a lack of candor determination ... where, as here, an irremediable conflict appears between records submitted to the Commission and testimony").

18. In sum, reliable documentary evidence and other substantial evidence firmly undergird the ALJ's findings summarized in para. 4 (a) - (d), above, and his conclusion that Center's false testimony establishes that "it does not have a propensity to deal honestly with the Commission. Rather, it has a propensity to deal falsely with the Commission, even under oath." *I.D.*, ¶ 103. Disposition of Center's renewal application is controlled by the Commission's holding in *Grenco*, 39 FCC 2d at 736-37, that:

> Complete candor from Commission licensees as to matters under investigation may be demanded and is expected. ... While issues are designated to place the licensee on notice of the charges which he will be required to meet at the hearing, notice to a renewal applicant that he must testify truthfully and not conceal material information is superfluous. Taking the oath serves the purpose and no unfairness results in holding a renewal applicant to have knowingly assumed the risk of an adverse determination as to its character qualifications when a principal testifies falsely at the hearing. ... [W]e cannot temporize with deliberate deception of the Commission. No matter how unblemished the reputation of the principal in the community, no one is allowed "one bite" at the apple of deceit. (citation omitted).

19. Center faults the ALJ in its exceptions for failing to consider the Commission's public policies supporting minority-owned educational stations, *see* Br. at 17-19; but the Bureau correctly notes in reply, at 9-10, that the Commission's policies of fostering minority ownership have never "suggested that th[ese] polic[ies] excuse[] a licensee's misconduct." Moreover, it is now well-established that a noncommercial broadcast applicant's "proclivity to deal truthfully with the Commission is a bedrock prerequisite to a finding of basic character qualification to hold a license." *KQED, Inc.*, 3 FCC Rcd at 2826 ¶ 24; *see also Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1399, 1429-30 (1978) (accountability of noncommercial broadcast licensees).

20. A meritorious past broadcast record can not mitigate or offset Center's lack of candor, which is a serious breach of trust undermining the integrity of the Commission's processes. *See KQED*, 3 FCC Rcd at 2827 at ¶ 27; *Standard Broadcasting Inc.*, 7 FCC Rcd at 8577 n.29. In any event, Center's past broadcast record includes a serious violation of Section 73.561(a), and (f), which requires that its noncommercial station "operate at least 36 hours per week, consisting of at least 5 hours per day on at least 6 days per week" and if the licensee cannot adhere to its operating schedule, notification must be sent to the Commission. Here, the ALJ found that resolution of a Section 73.561 issue designated in this proceeding by the Commission provided another ground for denial of Center's renewal since for some two years Station KUCB-FM remained silent without Commission knowledge or authorization in violation of 47 CFR § 73.561. *I.D.* at ¶ ¶ 104-107. Such a violation, on its face, is inconsistent with the general public interest, and the special needs of KUCB-FM's listening audience. The Bureau correctly notes at 12 n.7 of its reply

that "Center's exceptions do not specifically dispute Center's violation of Section 73.561 of the Commission's Rules" and that "any objection thereto is waived. Section 1.277(a) of the Commission's Rules." Nevertheless, in light of Center's disqualification on the misrepresentation and lack of candor issue, we do not reach the question whether the Section 73.561 violation is sufficient, standing alone, to also warrant Center's disqualification.

21. Finally, at an earlier stage in this proceeding, Center requested that we find that the ALJ's prehearing procedural rulings indicated bias towards Center, mainly due to their harshness to that applicant. After reviewing Center's showing in light of the legal standards set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and other legal authorities, we denied Center's motions. *Center for Study and Application of Black Economic Development*, 7 FCC Rcd 3101 (Rev. Bd. 1992). In its exceptions, at 14-17, 23-26, Center renews its bias claims against the ALJ and Bureau Counsel. The exceptions are without merit. Initially, as a matter of law, we note that since our prior ruling on this matter, the United States Supreme Court, in *Liteky v. U.S.*, 114 S. Ct. 1147, 1157 (1994), reinforced the controlling legal principle of *Grinnell* that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." The Court observed that: "A judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune." *Id.* Similarly, the United States Court of Appeals for the D.C. Circuit recently held that: "In an adjudicatory proceeding, recusal is required only where 'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of the particular case in advance of hearing it.'" *Metropolitan Council of NAACP Branches v. FCC*, No 93-1471, Slip Op. p. 18 (D.C. Cir. January 27, 1995). Center has not made the required showing of prejudgment.

22. Now that we have had an opportunity to review the factual record, we find that Center was not materially prejudiced by the ALJ's ruling of default, the primary gravamen underlying Center's claim of bias, which ruling technically precluded Center from presenting a direct case at the comparative hearing. We agree with the Bureau that Center did have an opportunity to present its case on the decisional misrepresentation issue. "Center offered all of the exhibits which it had exchanged before the Admissions Session and was not precluded from calling any witness on its list of witnesses because of the default ruling." Bureau Reply at 6. Our review of the record also confirms that the ALJ made a reasonable effort to accommodate the schedule of all counsel in this multi-party proceeding, *see Faith Center, Inc.*, 92 FCC 2d 1255 ¶ ¶ 15-16 (Rev. Bd. 1983), and that contrary to a contention by Center, Br. at 2, its chief counsel, Alfredo Parrish, had an opportunity to fully cross-examine Larry Nevilles, a former Station KUCB-FM employee and now a principal of Minority. *See* Tr. 656-717; 762-764. Lastly, Center has not made a showing of bias or prejudice on part of Bureau counsel because the Bureau participates in such hearing as a party, 47 CFR 0.61(d), is not a decisionmaker in this case, 47 CFR 1.1202(c), and was not shown to have prejudged any of the issues or was "impervious to contrary evidence." *Metropolitan Council of NAACP v. FCC, supra.*

**ACORN'S FINANCES**

23. *Background:* Non-commercial broadcast applicants, such as the applicants here, may certify that their financial qualifications are contingent upon later receipt of: (1) a grant from the National Telecommunications and Information Administration (NTIA); or (2) grants from charitable, educational, or government entities. *See* FCC Form 340, Section III- Financial Qualifications, Questions 1 and 2; *see also KQED, Inc.*, 5 FCC Rcd 1784, 1785 (1990). Question 3 of FCC Form 340, however, requires that applicants not relying upon the grant provisions above to check the "Yes" or "No" box in response to the following certification:

> The applicant certifies, except as noted above [in Questions 1 and 2] that sufficient liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without additional funds.

*Compare CHM Broadcasting*, 24 F.3d at 1455, financial certification by commercial broadcasters.

24. In their applications filed in January of 1990, both Acorn and Minority failed to certify that they were financially qualified as required by Question 3, above, both checking the "No" box. Within the period for amending as of right prior to designation for hearing, Minority filed an amendment certifying that it was financially qualified. Minority's certification was based upon its application for a grant of $100,000 from NTIA, and on a $50,000 loan commitment letter from the East Des Moines National Bank, dated February 21, 1990. *See* Exhs. C and D to Minority's Opposition to Motion to Enlarge Issues filed August 27, 1991. Acorn, however, did not amend its financial certification prior to designation for hearing.

25. On August 29, 1991, Acorn filed an amendment which merely certified "yes" to Question 3. A subsequent amendment, filed September 20, 1991, indicated that: Acorn had entered into an agreement with Affiliated Media Foundation Movement (AMFM), whereby the latter agreed to secure Acorn's financing; that on July 2, 1990, AMFM had received a commitment letter from "U.S. Trust for a loan for up to $700,000 for construction and initial operation of a radio station in Des Moines, Iowa"; and that Acorn needed "a total of $155,355" to finance its proposed station. Petition to Amend at 2, Exh. A. When the ALJ was notified by the Mass Media Bureau's pleadings that Acorn had failed to certify its finances prior to designation for hearing and that Acorn's reliance on the UST loan commitment letter raised substantial questions of fact, the ALJ added the following issue against Acorn:

> To determine whether [Acorn] has reasonable assurance of funds to construct and operate Channel 207C; whether [Acorn] is financially qualified; and whether [Acorn] is qualified to receive a Commission [construction] permit for the Des Moines community.

Tr. 72-73; *see also Order*, FCC 91M-3004, released October 3, 1991; *I.D.*, ¶ 4. Both the burden of proceeding and the ultimate burden of proof were placed on Acorn. *Id.* ¶ ¶ 4, 76, 121-122.

26. At hearing, Acorn submitted a letter from AMFM dated December 27, 1989, which states in pertinent part:

> This letter will confirm the willingness of [AMFM] to secure funding for [Acorn]. We are able to make a commitment of $730,000 in the form of unsecured loans.

*Id.* at ¶ 79. The parties do not dispute the ALJ's finding that AMFM was only acting as an intermediary. Acorn ultimately relied on the UST letter to AMFM dated July 2, 1990, which recites in part:

> This letter states the conditional commitment of our investment management clients to loan up to $700,000 to assist AMFM in the financing for construction and initial operation of a radio station licensed to Des Moines, Iowa. Their willingness to do so is subject to the following conditions: ...
>
> (2) All reasonable and ordinary credit criteria of [UST] are met at such time as [Acorn] (a) has received the permit to construct said station and (b) requests from our client via [UST] a formal and unconditional lending commitment; and,
>
> (3) [UST] receives, once the above conditions have been met, the written agreement to the terms of the loan from each and all of our investment management clients participating in the loan.... The precise terms of security of the loan also will be determined at the time of the unconditional loan commitment.

*Id.* at ¶ 80. The letter concludes:

> [UST] is personally and favorably acquainted with [AMFM] and we would be relying on your commitment to continued participation in the venture and *management of the radio station* as a part of the loan application.

*Id.* at ¶ 82. (Emphasis added).

27. Acorn's President Pauline Green, who had signed the financial certification, on August 29, 1991, did not offer any direct testimony regarding the financial issue. On cross-examination, she stated that Acorn had contracted with AMFM to secure financing for Acorn but did not submit any financial statement to AMFM. *I.D.*, at ¶ ¶ 78-79. Green also testified that Acorn's budget estimate was based upon AMFM's expertise and experience with other stations AMFM operates. *Id.* ¶ 86. After reviewing the relevant evidence, the ALJ found that "the estimate of $700,000 was based on raw speculation and lacked any foundation in reasonable fact," and that the mistake was attributable to AMFM because:

> ... Moody and Rathke [UST and AMFM principals] testified that in actually the likely amount of the loan would be $150,000. (Moody, Tr. 518, Rathke, Tr. 548, 561.) Mr. Rathke surmised that the $700,000 figure was a mistake on the part of UST in using another unrelated project as the basis for the estimated costs because the $700,000 estimate clearly was excessive for Acorn's needs. (Rathke, Tr. 550, 551). However, since UST was relying on AMFM for the project's management, it is more likely that the mistake was AMFM's. In fact, on December 27, 1989, AMFM was committing to secure $730,000 and on July 2, 1990, UST was referring to a conditional loan commitment of $700,000.

*Id.* at ¶ 87.

28. Acorn's proposal to finance its station "through a UST commitment letter to a third party, AMFM," was found by the ALJ to be deficient as a matter of fact for several reasons. Initially, he pointed to "a fundamental error" that both the AMFM and the UST letters were based on "an erroneous assumption that Acorn would require $700,000 to construct and operate" the proposed station, whereas "the true estimate would have been approximately $150,000." *Id.* at ¶ 123. The Des Moines radio proposal had apparently been confused by AMFM with an unrelated and more expensive TV proposal. *Id.* This fatal factual error in UST's letter, the ALJ found, occurred because Acorn was not consulted by UST, there was no relationship between Acorn and UST, and therefore, there was no meeting of the minds on a true estimate of costs. *Id.* Moreover, he found several specific conditions in the letter from UST to AMFM that "neutralize any commitment": the UST "conditional commitment" would provide funding only so long as AMFM continues to be involved in the management of Acorn's "radio station" even though AMFM is not a party to the application; UST must first obtain prior approval from potential investors and there is no evidence that any investor has seen Acorn's financial statement or a plan of operations which discloses experience of operating personnel and a feasibility of performance; and not one of the potential investors has expressed a willingness to participate. Accordingly, the ALJ concluded that the UST/AMFM letters were "meaningless" and "ephemeral" so that no reasonable applicant could rely upon them to establish reasonable assurance. *Id.* at ¶ 124.

29. *Discussion.* A broadcast applicant must have reasonable assurance "before the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). Whether an applicant has a reasonable basis to certify turns on "an objective inquiry" rather than the applicant's subjective intent, and probative evidence must be adduced at the hearing. *See Aspen FM, Inc.*, 5 FCC Rcd 3196, 3198 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1602 (1991). Commission precedent also requires that loan commitment letters demonstrate more than a generalized "interest" to make a loan. *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1986 (Rev. Bd. 1987). A valid commitment letter need not establish "a legally binding commitment", *Multi-state Communications, Inc. v. FCC*, 590 F.2d 1117, 1119 (D.C. Cir. 1978), but it must establish a "present firm intention to make a loan, future conditions permitting." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980).

30. Here, Acorn's certification that "sufficient funds are available from committed sources to construct and operate the requested facilities for three months without additional funds", FCC Form 340, Question 3, was based on the loan commitment letter from UST to AMFM. As the ALJ correctly concluded, however, it was apparent on the face of the documents before Green when she certified that Acorn did not have reasonable assurance. First, Acorn needed approximately $150,000, but the AMFM/UST contingent commitment letters were based on the erroneous assump-

tion that $700,000 was needed; thus, we agree with the ALJ that there was no meeting of the minds on the true estimate of Acorn's financial need. Second, and even more fatal to Acorn's financial certification, was the fact that on its face the UST "conditional commitment" letter was contingent upon AMFM's "continued participation in the venture and management of the radio station as a part of the loan application." *See* ¶ 26 above. Green had to know at the time she certified that this condition was impossible to accomplish because Acorn's application, even as amended, did not propose AMFM in a management role. AMFM had been retained to provide technical assistance regarding engineering, financial, legal, and other matters relative to Acorn's application. *I.D.*, at ¶ 78. According to its application, Acorn intends to own, manage, and operate the station. Finally, UST's letter indicates on its face that before UST can make a loan the applicant must first obtain the approval from participating potential investors, and not one such investor has expressed a willingness to participate. Reinforcing the obstacle imposed by this condition is the testimony of an AMFM principal that AMFM had previously never arranged a loan directly from UST; instead, it had obtained loans from clients that were part of the portfolio managed by UST. Tr. 551. An objective review of the documents on which Green based her certification supports the ALJ conclusion that no reasonable applicant could have certified based on those documents. *CHM Broadcasting*, 24 F.3d at 1457-1458 ("reliance on *objective* information" for financial certification).

31. Acorn's principal contention is that the ALJ failed to recognize that the traditional lending criteria may not be relevant in the noncommercial context. It argues for "an expanded notion of what actually constitutes reasonable assurance.'" Br. at 4. Acorn points out that UST and its clients were responsible for "making socially and ethically responsible investments" and that "financial information might not be sought because the investment concern might be solely about the social benefit of that investment.'" *Id.* Had the ALJ applied these "criteria," Acorn argues, it would have been found to have reasonable assurance of financing. *Id.* at 5. This argument is of no avail. In essence, we agree with the Bureau's reply that only if Acorn had relied on an NTIA, charitable, educational or other governmental grant would a different noncommercial standard have been applicable. *See* ¶ 23 above; *KQED, supra*, 5 FCC Rcd at 1585. On the record of this case, the Bureau points out that "it is irrelevant that the potential investors are interested in socially and ethically responsible investments, as Acorn insists. There simply are no investors upon which Acorn could reasonably rely." Bureau Reply at 15-16.

32. Acorn's final contention regarding finances (Br. 11-12) is that the ALJ was "arbitrary and capricious" and acted contrary to administrative "due process and equal protection of the laws" when he added a financial qualifications issue against Acorn but refused to specify a financial issue against Minority. Acorn alleges that Minority's showing contained "comparable contingencies" as those in Acorn's letters. *Id.* at 12. Acorn and Minority were not similarly situated procedurally. Acorn failed to financially certify prior to designation for hearing and the Commission's processing staff inadvertently did not designate a financial issue against Acorn. Minority, on the other hand, amended its application as of right prior to designation for hearing certifying that it was financially qualified. Thus, Acorn had to make a *prima facie* showing that a financial issue should be designated against Minority, which it failed to do. *See* 47 CFR § 1.229, and Bureau Reply at 17. Our review of the documents before the ALJ, *see* ¶ 24, above, reveals that, as a matter of fact, Acorn and Minority were not similarly situated. Minority's financial certification was based upon an NTIA grant explicitly contemplated by Commission policy, *see KQED, supra.* Acorn did not rely upon such a grant. Minority's certification also relied on a bank letter, but a review of that letter indicates that it did not contain any of the fatal contingencies present in Acorn's letters. We therefore affirm the ALJ's conclusion that substantial evidence in the record establishes that Minority is the only qualified applicant to receive a construction permit for a noncommercial FM station in Des Moines, Iowa. *I.D.*, at ¶ ¶ 132-135.

33. ACCORDINGLY, IT IS ORDERED, That the application of Minority Communications, Inc. for a construction permit for a new FM station (File No. BPED-900116MA) IS GRANTED; the license renewal application (File No. BRED-900131UA) of Center for Study and Application of Black Economic Development for Station KUCB-FM, Des Moines, Iowa IS DENIED; the application of Iowa Acorn Broadcasting Corporation for a construction permit for a new FM Station (File No. BPED-900102MB) IS DENIED; and Center for Study and Application of Black Economic Development IS AUTHORIZED to continue operation of Station KUCB-FM until 12:01 A.M., on the forty-fifth (45) day from the release date of this *Decision* to enable the licensee to conclude the station's affairs, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or Commission.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

## STATEMENT
## of
## BOARD MEMBER MARJORIE REED GREENE

When all is said and done, Center's qualifications turn on a question of character: whether this licensing Commission can trust the information Center's principals provide. From this record, the answer is no.

This proceeding began with an issue to determine whether Center had misrepresented in its renewal application when certifying that no party to the application had any felony convictions, although Charles Knox, a man Center identified as its president, had twice been convicted of felonies in federal court. As the hearing progressed, Center's candor in responding to the issue came into question.

Charles Knox was a moving force behind Center and KUCB-FM from the station's inception in 1979 and in 1984 took on the title of president. *See generally* Bureau Exh. 1, p. 15 (December 10, 1984 letter signed by Knox as "President"); tr. 1424. Center reported Knox as president in ownership reports dated May 23, 1987, and April 12, 1988. Bureau Exh. 1, pp. 87-90. When Center applied for renewal on January 22, 1990, it again reported Knox as president in the accompanying ownership report. Bureau Exh. 12, p. 5. It also answered "no" to question 6 on the renewal application inquiring about felony convictions of parties to the application. *Id.*, p. 3.

Knox, however, had been convicted in the United States District Court for the Western District of Texas for two counts of fraudulently representing that he was licensed as an attorney in the State of Illinois for purposes of attorney-client visits to an inmate under the jurisdiction of the Department of Justice; he was sentenced on May 29, 1987 to imprisonment for three years and probation for an additional five years. Bureau Exh. 15. For the next year and a half he unsuccessfully appealed to the federal circuit court and the Supreme Court. Tr. 1439. He was next convicted following a guilty plea in the United States District Court for the Northern District of Illinois for, *inter alia*, embezzling funds he had received for KUCB-FM from the National Telecommunications and Information Administration between February 1985 and March 1986; he was sentenced on September 27, 1989 to imprisonment for three years and probation for an additional five, the sentence of imprisonment to run concurrently with and include credit for time served under the Texas conviction.[1] Bureau Exh. 16; Bureau Exh. 17, pp. 4-5.

[1] There is no information in this record about when, if ever, Knox was actually incarcerated under either sentence.

According to Center, its board members knew nothing of Knox's convictions until after the renewal application had been filed, although witnesses certainly admitted to an awareness that Knox had problems with the law attributed to his activism on behalf of the African American community, and KUCB-FM had participated in Knox's legal defense fund in 1987. *See* Ako Abdul-Samad, tr. 1134; Kalonji Saadiq, tr. 1132, 1430-31.[2] Knox testified that during a KUCB talk show he "may have referred" to his alleged 20-year persecution by the FBI for his community activities but otherwise "really did not like to discuss his legal problems with anybody." Tr. 1431-32, *see* tr. 1436, 1440. From Knox's point of view, "people are more interested in my technical ability than whether or not I have a conviction. There is just not that standard in the community, there." Tr. 1440. Ako Abdul-Samad, a Center vice president at the time of renewal, described his first awareness of Knox's convictions as an awareness in "the spring of '90" "that there was a problem, that Charles had gotten into a situation and he was being persecuted, and we had to do something to help, you know, him in the community as we would do anyone else." Tr. 1134.

Also according to Center, Knox was not actively involved in Center activities, so his felony should not prejudice the applicant, Brief, p. 19; there was confusion within the Center board about when Knox ceased his participation with KUCB, *id.*; and

> once the knowledge of the convictions of Dr. Knox became known, a prime objective was to openly accept the resignation of Knox and exclude his name from any further actions taken by Center or KUCB. It was due to the lack of information regarding his convictions and the uncertainty of his capacity within the organization by some officers that erroneous information appeared in the Center's application for renewal.

Brief, p. 21.

The record shows that Knox has been active with Center until KUCB-FM went dark between 1987 and 1989. Station personnel sought Knox's help in dealing with the FCC and relied on him for technical training and legal matters. Samad, tr. 1079; Saadiq, tr. 1258, 1289; Long, tr. 1048-50. His name regularly appeared on submissions to the Commission as either the signatory or the one to whom Commission communications should be sent. *See* Bureau Exh. 1, pp. 10, 15, 56; Bureau Exh. 4, p. 2 item 2; Bureau Exh. 2, p. 1 item 2; Bureau Exh. 3, p. 1; Bureau Exh. 5, p. 1; Bureau Exh. 6, p. 1; Bureau Exh. 7, p. 1; Bureau Exh. 9; Bureau Exh. 10, pp. 1, 3. Knox "was primarily responsible for grantsmanship, and developing the financial resources," according to Kalonji Saadiq, who was with the station until the

[2] Long's testimony is consistent but evasive. *See* tr. 1005, 1028-31.

end of 1986. Tr. 1269, 1274, 1298 (Saadiq returned some time after the renewal had been filed, probably early 1991, tr. 1275-76). Knox testified he had "[p]robably very little involvement" during the period the station was dark,[3] although station personnel "continued to call me anyway, for consultation," and write to him about station business. Tr. 1391-92. When the station went back on the air in 1989, Knox was "somewhat involved" in the move to the station's Sixth Avenue quarters, and he prepared the 1990 renewal. Knox, tr. 1366, 1395. Until "about the spring of 1990," he "was the one dealing with the technical assistance of the station." Samad, tr. 1135-36. Thus, although Knox may have had reduced contact while the station was dark, Knox again became involved when the station resumed activity. The test for party status, however, is not how actively involved a principal is but whether that person is in the decisionmaking position of governing board member or officer. *See* Ownership Report for Noncommercial Educational Broadcast Station, FCC Form 323-E, p. 2, item 5 (Sept. 1987).

When Knox left Center's board is far from clear on this record. Long testified that Knox had not been involved with Center since the early 1980's, although he was not sure of the exact date. Tr. 889, 993-94. He added that Knox was not president when Long himself signed Center's 1988 ownership report listing Knox as president, or at the time of Center's 1987 ownership report listing Knox as president, or on January 22, 1990 when the renewal application was signed and he was listed as president in the accompanying ownership report. Tr. 997-99. According to Samad, the Center board met to elect new members when KUCB-FM went back on the air in December 1989; Wayne Ford joined the board and was elected president at that time -- with the condition that Knox not be involved or consulted further. Tr. 1119-20, 1150. But, Samad also said that the board was dealing with Knox' resignation at a board meeting in the spring of 1990, after Knox's convictions had become known to the board, and that Knox had been providing technical assistance to the station. Tr. 1135-36. Knox testified that he had been trying to resign from the presidency since 1986 or 1987, but the board "did not want to accept a resignation." Tr. 1397-98. He said he was on the board from the mid-1980's "to resignation, in 1989, even though I tried to resign before that time. I just could not get the board to accept it." *Id.* His resignation had been by telephone, but "in 1989" he submitted a written resignation at Ford's request. Tr. 1400, 1416. If this existed, it was never entered into evidence.[4] On cross-examination Knox wavered in his certainty about when he

[3] This was during the period of Knox's appeal from the Texas conviction. Knox testified he was not out and about during that time, so he was not in Des Moines then. Tr. 1439.

[4] When asked on direct examination whether Ford, in 1989, had requested a written form to follow up on the oral resignation from three years earlier, Knox responded, "Yes. Mr. Ford wanted, he could not find the file." Tr. 1398. Knox

resigned in writing. He said he was "pretty sure [his written resignation] was around 1989, and preceded the telephonic piece." Tr. 1416. Knox was not sure, however, when Ford was elected president of the board. "It could have been in 1990. I am not sure." Tr. 1417. Knox also was not sure whether Ford was president when he requested Knox's written resignation. "He [Ford] was either president of the board, or ready to be president of the board, or something to that effect, but at the time he requested the resignation, he needed a letter." Tr. 1417. Ford did not appear. The only documentary evidence is Center's March 9, 1990 ownership report which, unlike earlier reports, does not include Knox. Bureau Exh. 1, pp. 91-92.

What is puzzling is why Long, who had filled out the 1988 ownership report listing Knox as president and had asked Knox to take care of the renewal in 1990, would testify that Knox had ceased to be involved in the early 1980's, before the 1987 ownership report listing Knox as president for the first time and the 1988 report signed by Long. Nor did he suggest who might have been president in Knox's place during this period. Also puzzling is why Samad and Knox would testify that Ford sought Knox's written resignation *in 1989* and Samad would explain that the board changes were conditioned on no further involvement or consulting by Knox -- before the board supposedly knew about the convictions and before Long asked Knox to take care of the renewal. Previous board elections had seemed fairly informal; Knox had said he wanted to be replaced; there is no hint in the record of friction between Knox and either Ford or the board in 1989; and there is no hint of any board effort to seek other advisors. In short, the record is devoid of any reason for needing a written resignation and separation from KCUB in 1989, if Center's argument that it knew nothing of Knox's convictions until later is to be believed. Indeed, Saadiq (who returned to Center some time after the renewal had been filed) described Knox as "an inspiration to the station," tr. 1304, and Samad "had just a real problem [with Knox's resignation] till things were explained to me."[5] Tr. 1136. This was "in about the

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continued with an explanation that files were missing from break-ins at the station in about 1986 and 1987, but failed to explain what these break-ins had to do with his written resignation in 1989 or what documentation of his earlier oral resignation might have been affected.

[5] Because Saadiq had returned to the station some time after the renewal application was filed and Knox's resignation demanded, he did not personally observe what transpired then. Nonetheless, based on what he "had heard," he referred during his August 17, 1991 talk show to "a time when [Knox], who was a major thrust in this radio station, *had to resign*." Tr. 1310-11 (emphasis added). He referred to Knox as his "beloved" and "courageous brother" whom he "loved dearly." *Id.* Saadiq confirmed in his testimony that he "had heard that [Knox] had to resign." Tr. 1311. While this hearsay does not establish that Knox was forced to resign, the statement shows that this is what Saadiq had heard about the resignation.

spring of 1990," when the board was dealing with Knox's criminal convictions and resignation letter. Tr. 1135 (testimony does not make clear whether resignation letter had been received or whether decision to request one had been made or was still under consideration).

Also puzzling is the testimony of Long and Knox about preparation of the 1990 renewal application. Long tried to create the impression during his testimony before the ALJ that *he, Long,* had prepared, signed, and sent in the 1990 renewal application, even going so far as to explain why he had erroneously included Knox's name in the accompanying ownership report,[6] although he did not prepare either the application or the ownership report at all, or sign them, or send them in. Tr. 996-97, 1000, 1394. Long also said he was not in substantial contact with Knox when he, Long, filled out the renewal, although, according to Knox, he had called Knox in Chicago to ask him to prepare it because no one else would. Tr. 956, 1394-95.

Knox kept up the subterfuge in his testimony. He testified that, when he received the renewal application from Long, "it was for the most part, already filled out. We are talking about the application and the Equal Opportunity report?" Tr. 1414. He said that the copy he received from Long included the listing of board members on the ownership report. Tr. 1413. He said that, when he learned that an erroneous ownership report had been filed, he contacted Samad and talked with Long about the need for a corrected report. Tr. 1411. Yet, when shown the application and ownership report, he admitted the handwriting listing the names and addresses of board members is his and that he had filled out and signed Long's name to the ownership report. Tr. 1415. He had even corrected his own address, which suggests more than a mindless copying of an old report, if he even had one at hand. *Compare* Bureau Exh. 12, p. 5 (Center 1/22/90 ownership report), *with* Bureau Exh. 1, p. 88 (Center 4/12/88 ownership report). He did not dispute Bureau counsel's assertion that

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[6] When questioned about why the January 1990 ownership report includes Knox, Long said:

> Lots of times when we sent -- when I sent the ownership report in, we -- in the times I sent it in, we didn't remove -- I didn't remove people that had been -- was no longer with the Center. I didn't remove their names, because when you do the ownership report, to add some people in, you always remove some people.

Tr. 996. However, the 1988 report Long filled out did include an additional name, his, and was handwritten. *See* Bureau Exh. 1, p. 88. Long also explained he was in a hurry when he did ownership reports, although the record shows that he did only the 1988 report. Tr. 996.

he had filled in the negative response to question 6 regarding felony convictions on the renewal application himself, and he admitted to signing Long's name for the certification. Tr. 1395-96, 1415, 1416. Indeed, all of the information on the renewal and accompanying reports is handwritten, and all of the handwriting on the renewal application form and on the attached Equal Opportunity Report bears a strong resemblance to Knox's handwriting on the ownership report and no resemblance to the handwriting on Center's April 12, 1988 ownership report that Long said he had prepared.[7] Tr. 998; *compare* Bureau Exh. 12 (Center 1/22/90 renewal application, with attachments) *with* Bureau Exh. 1, pp. 87-88 (Center 4/12/88 ownership report). Yet, both Knox and Long had claimed Long participated in preparing the form. On January 30, 1990 Center forwarded an additional copy of the renewal application to the Commission. Bureau Exh. 13. The transmittal letter is signed "Jamal Long" in a handwriting that strongly resembles the signatures reading "Jamal Long" that Knox wrote on Center's January 20 renewal application, ownership report and transmittal letter. *Compare* Bureau Exh. 13 with Bureau Exh. 12, pp. 1, 3, 5.

So, what conclusions should this Review Board draw from all of this? Center would have us believe the misinformation in the renewal application was simply a mistake resulting from the board's lack of information about Knox's convictions and uncertainty about his position. But, there is only Knox's uncorroborated testimony that he tried to resign in 1986 or 1987. Center repeatedly reported Knox as its board president from 1987 until its March 9, 1990 report, which stated that the information therein was reported as February 10, 1990, several weeks after the renewal had been filed. Bureau Exh. 1, p. 91 item 4.[8] According to Knox, Center continued to seek his

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[7] The only information needed on Center's Equal Employment Report was the call letters, licensee name, and community of license for the station, an "x" to indicate the type of station, the name and address of the person to whom notices and communications should be sent, and an "x" to indicate that the station employs fewer than five full-time employees. The only information needed on Center's renewal application was the applicant name; its address, call letters, and principal community; two responses, each indicated by an "x," showing that employment and ownership reports were attached; yes or no responses to four additional questions; and a certification as to the truth, completeness and correctness of the information. Center added a five word response to one question. Knox testified that Long had asked for his help because "[t]here was some problem with filling out the renewal application, and he requested assistance, my assistance, in filling that application out." Tr. 1394. The nature of the "problem" was never identified.

[8] The record includes a memorandum from the board authorizing Richard Eugene Fowler to be station operator. Bureau Exh. 1, p. 76. This was signed by Ford and dated January 26, 1990, just four days after Center's renewal application was signed, but it was not authenticated during the hearing by Ford or any other witness. Even

assistance in spite of his protestations that other board members learn to handle things themselves, and Long, who testified that Knox hadn't been involved since the early 1980's, turned over the 1990 renewal application to Knox. Indeed, from the handwriting in the January 30, 1990 letter transmitting a copy of the renewal to the Commission, it appears that Knox did even that. According to Samad, the decision about Knox's resignation -- in the spring of 1990 -- was a difficult one, and Saadiq later heard that Knox's resignation had been forced. From all of this, Knox's preparation of the renewal application appears to have been business as usual. There is much on this record to support the ALJ's conclusion that, at the time of the renewal, Knox was a party to the application and knowingly misrepresented when saying no party to the application had been convicted of a felony.

Center clearly has been badly served by Knox. Center's members trusted him, relied on him, revered him. *See* Saadiq, tr. 1304, 1325. In return, Knox embezzled funds Center badly needed, let KUCB and Center members participate in fundraising for his defense, and may well have avoided disclosing the reasons for his persecution to Center members. Had Center been candid about what went on with Knox, it may well have found sympathy at the Commission. But, this record does not show candor. Center argues that, when it learned of Knox's convictions, it took public action. If it learned of the problems after the renewal had been filed, as it said it did, why Samad's repeated testimony that action was taken in 1989 -- before the renewal application and before competing applications threatened Center's renewal? Why did Knox testify to board action in 1989 until pushed on cross-examination? Why did Long deny Knox's involvement in Center since the early 1980's -- while turning to Knox to take care of the renewal and insisting he had done it himself? Knox's testimony about this, too, is lacking in candor, changing from what appears to be Center's story only when pushed on cross-examination.[9]

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if Ford had been authorized to act as president on January 26, this does not establish that Knox had left the board before February 10, 1990, the reporting date specified in the March 9, 1990 ownership report filed by Ford. *See* 47 CFR § 73.3615(a) (ownership reports shall provide the information as of a date not more than 60 days prior to the filing of the report).

[9] Although according to Center Knox was not a Center director or officer when he testified, the ALJ found that Center presented Knox as a witness and vouched for the truthfulness of his testimony. *ID* ¶ 101. The ALJ ordered Center to produce Knox as a witness. Center complied but did not treat Knox as a hostile witness. Indeed, we note that Center's counsel here represented Knox at judgment in the Texas matter. *See* Bureau Exh. 15, p. 1. In this context, his lack of candor is relevant to the overall question of Center's candor.

There is testimony on this record about the lack of legal justice and government persecution. *See* Samad, tr. 1134; Saadiq, tr. 1288, 1304, 1311-12; Knox, tr. 1432 ("I feel that the FBI was totally involved with trying to destroy the station and had influence on those agencies which even regulate the station."). I want to emphasize that this Review Board's decision has nothing to do with government persecution or quashing civil rights activities and everything to do with the Commission's requirement of truthfulness and reliability from its licensees, an expectation derived from the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), and years of Commission precedent. *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183, 1210-11 (1986). The false statement in Center's renewal application is transformed from the wrongdoing of one malfeasant by the candorless testimony of Long, by Samad's participation in the attempt to show that Center's break with Knox came before it actually occurred, and by presenting as truthful candorless testimony from Knox. This alone warrants disqualification. *See Richardson Broadcasting Group*, 7 FCC Rcd 1583, 1583-85 (1992), *recon. denied sub nom. Elizabeth M. Younts*, 8 FCC Rcd 1714 (1993), *aff'd by judgment*, 995 F.2d 306 (D.C. Cir. 1993).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

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|---|---|
| COAST TV | **MM Docket No. 84-934**<br>File No. BPCT-840720KG |
| MISSION BROADCASTING CORPORATION | **MM Docket No. 84-935**<br>File No. BPCT-840723KI |
| SOLAR TELEVISION | **MM Docket No. 84-936**<br>File No. BPCT-840723KJ |

For a TV Construction Permit
Santa Barbara, California

**Appearances**

*Donald Ward*, on behalf of Coast TV; *Michael Bader and Melodie A. Virtue*, on behalf of Mission Broadcasting Corporation; and *Michael Couzens*, on behalf of Solar Television.

**DECISION**

**Adopted: March 2, 1995; Released: March 17, 1995**

By the Review Board: MARINO (Chairman) and GREENE.

Board Chairman MARINO:

1. This proceeding returns to the Review Board after two remands for additional hearing that have resulted in the disqualification of two of the three competing applicants. In the first remand, we sent the case back to determine whether Solar Television, Inc. (Solar) was financially qualified to be a licensee and whether it had falsely certified its financial qualifications. *Coast TV*, 5 FCC Rcd 6720 (Rev. Bd. 1990) (*Remand Order I*). Administrative Law Judge Edward Luton (ALJ) resolved the issues adversely to Solar and denied its application. *Supplemental Initial Decision (S.I.D.I)*, 7 FCC Rcd 1375 (ALJ 1992). Subsequently, the Board remanded again when identical issues were raised against Mission Broadcasting Corporation (Mission), and held in abeyance Solar's exceptions to *S.I.D. I* so that the Board could issue a single decision addressing the qualifications of both applicants. *Coast TV*, 7 FCC Rcd 6244 (Rev. Bd, 1992) (*Remand Order II*). Pursuant to *Remand Order II*, the ALJ determined that Mission was also financially unqualified and denied its application. *Supplemental Initial Decision (S.I.D. II)*, 9 FCC Rcd 581 (ALJ 1994). Mission's exceptions followed.

2. Subsequent to the issuance of *SID II*, the Commission froze further adjudication of comparative broadcast proceedings in light of the court decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Only those cases whose resolution does not depend on consideration of the applicants' comparative qualifications may go forward. *See FCC Freezes Comparative Proceedings* (Public Notice), 9 FCC Rcd 1055 (1994). Here, we have reviewed *SID I* and *SID II* in light of the exceptions filed by Solar and Mission to their respective disqualifications, the responsive pleadings of the other parties, and the underlying supplemental hearing record. We conclude, for the reasons stated below, that both *SIDs* are correct and should be affirmed. Accordingly, because the case will not be decided on comparative grounds, we will proceed to issue a decision and make a grant to the only remaining qualified applicant, Coast TV (Coast). *See Modifications of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689 (1994) (Issues concerning applicant's basic qualifications may be adjudicated in comparative proceeding during freeze where applicant's disqualification would obviate comparative evaluation.)

**Solar**

3. Background. Solar's three principals--Eugene Huguez, Kenneth Hinton, and Suzanne Manriquez--certified to the applicant's financial qualifications in the application filed July 23, 1984. According to Hinton, at a July 18 organizational meeting among the principals and Michael Couzens, their communications attorney, a cost estimate of $2 million was developed for financing the proposal. Hinton testified that they developed the figure by going through and discussing each of the cost components at that meeting. Manriquez agreed in her testimony that the entire cost figure was developed at the meeting, although she did not recall whether programming costs were discussed. Huguez testified, however, that the $2 million figure was developed prior to the meeting on July 18 and that he did not recall an item by item discussion of figures at that meeting. Both Hinton and Manriquez testified that they discussed a cost estimate as low as $1.8 million. Hinton also stated that the group agreed its prosecution costs would amount to $200,000-$250,000 of the total figure, whereas Huguez stated that they had estimated the prosecution costs as high as $400,000. *SID I*, paras. 2-4; tr 2597, 2602-03, 2638, 2665-7, 2678-79, 2691, 2833, 2869-70, 2878; Solar Exh. R-1.

4. Although Huguez testified that Solar's cost estimate had always been $2 million and had never exceeded that figure, Huguez wrote a letter on July 9, 1986 to Brenda Bell, a Solar investor who had lent money to the applicant for prosecution costs, stating that Solar would need $2.5 million to finance the proposal. Huguez stated that Bell's investment "made it possible for us to get where we are today." He further stated that the $2 million figure "was our budget" figure and "for purposes of certifying", but "[i]n the real world, however, $2.5 [million] may not be unreasonable." He chose to give the investor the realistic figure. *SID I*, paras. 19-20, 23; Mission Exh. R-1; tr. 2906, 2908, 2954, 2957.

5. Prior to the July 18 meeting of the Solar principals, Couzens informed Huguez that a client of his named Arnold Applebauum "might" be willing to finance the proposed station. Huguez testified at deposition that there was "no set understanding" prior to filing as to how to pay prosecution costs, but at hearing, he stated they had decided at the July meeting to look to the issuance of nonvoting stock or loans. Manriquez stated at deposition that her understanding was that Applebaum would pay the "total cost", including prosecution, but at hearing she said "the specifics" had not been discussed at the July meeting and that there was no "plan" prior to filing. Hinton stated

that at the time he executed the application, Applebaum was the committed source, but that he had no first-hand knowledge of Applebaum's ability to finance the proposal and had not seen any financial information about him. Nor had the other principals sought or obtained such information and Hinton has never met or spoken to Applebaum. *SID I*, paras. 2, 5-7; tr. 2604-09, 2615-16, 2628-29, 2671-73, 2678-79, 2823, 2871, 2902-04, 2922-23.

6. According to Hinton, he was told by Huguez at the July meeting that Applebaum would be Solar's financial source and that, at the same meeting, Couzens had vouched for Applebaum's financial ability. At deposition, Hinton stated that Solar had looked to Applebaum only to guarantee a bank loan but, at hearing, upon being refreshed, he stated that Applebaum's commitment could involve providing his balance sheet "to help us obtain a bank letter", providing a lease agreement, or providing his own assets if needed. Hinton also stated that Solar believed it would need a bank loan. *SID I*, paras. 8-9; tr. 2668-71, 2674-75, 2690.

7. Based on conversations with Couzens prior to the July 1984 meeting, Huguez informed the other principals that he had a "committed source", and at the meeting, he identified the source as Applebaum. Huguez's understanding was that Applebaum's commitment was to provide assistance in obtaining a bank loan and an equipment lease. Huguez also testified, however, that the group relied on Applebaum for $2 million in cash although no terms were ever discussed for such a loan. Nor did Huguez send an equipment list to Applebaum or have any idea of what any equipment lease terms would be. And none of Solar's principals sought a bank loan in 1984 with or without Applebaum's help. *SID I*, paras. 10-11, 13-15; tr. 2608, 2634-35, 2816-17, 2825-26, 2829-30, 2833, 2837-38, 2866, 2919-21, 2929-30.

8. In 1990, following *Remand Order I*, Solar decided to "strengthen" its case by relying on a new financial source, Susan Major, to provide backing for a new bank letter, which it obtained from the City Commerce Bank. Couzens advised obtaining a new source because he was involved in a fee dispute with Applebaum. Nevertheless, Hinton and Manriquez testified that Solar can still look to Applebaum as a "committed source". *SID I*, paras. 18, 21; tr. 2616-17, 2621-22, 2627-28, 2679-81, 2687-89.

9. The ALJ concluded that the contradictory testimony given by the Solar principals undermined any claim that serious and reasonable efforts were made by it to determine costs before certifying the application. Its $2 million cost figure, the ALJ found, was merely an estimate of what a theoretical television station might cost to build and operate, not an attempt to state a cost proposal for a specific station. Solar also failed to show it had reasonable assurance of sufficient funding to meet costs at the time it certified, the ALJ concluded. The applicant was weighing various options at the time it filed its application, the ALJ found, and its principals offered differing views as to how they had agreed to meet costs, and whether Applebaum would provide $2 million in cash or merely guarantee a future bank loan. Despite its reliance on Applebaum, the ALJ noted, Solar had no oral or written understanding with him and presented only the uncorroborated assertion that counsel told its principals in 1984 that Applebaum would serve as its financial source. The Solar principals had no knowledge of Applebaum's financial condition at the time, the ALJ found, and thus falsely certified because they had taken no steps to ascertain that their source had the ability to finance the proposal. Because its certification was false, the ALJ concluded that Solar could not show that it was presently financially qualified either. He therefore struck Solar Exhibits R-3 and R-4 containing its current financial showing, which he had received in evidence contingent on Solar being found financially qualified at the time it filed its application.

10. In its exceptions, Solar states it believed in good faith that the steps it took in 1984 to certify its application were reasonable, and that, therefore, no finding of misrepresentation is warranted. As to its cost estimates, it claims that its principals' varying recollections related only to their different degree of involvement in developing the cost figure but that they all agreed on a total figure of up to $2 million. The disparity in the letter to Brenda Bell, it maintains, resulted because that letter referred to a possible additional cost of $500,000 to buy out its opponents. While Huguez's testimony in this regard was "confusing", Solar concedes, it does not undermine its contention that it always adhered to a cost estimate of $2 million. With regard to its funding source, Solar argues it is irrelevant that its principals had no first-hand knowledge of Applebaum's finances because their attorney determined the facts as their agent. Solar states that it did call on Applebaum to provide his balance sheet to help them obtain a bank letter and that the letter was in fact obtained on June 24, 1988, as reflected in Solar Exhibit R-2. Thus, despite confusion in the record, Solar states, its 1984 belief was reasonable and there was no false certification. Finally, Solar maintains that the ALJ erred in striking its current financial proposal, which contains a new bank letter from City Commerce Bank, dated July 27, 1990, from the record. It argues that the Commission has long had a policy of liberally allowing financial amendments but that, nevertheless, in recent years the Board and the Commission have erroneously departed from this policy without justification, citing *Aspen FM, Inc.*, 5 FCC Rcd 3196 (Rev. Bd. 1990), *rev. denied*, 6 Rcd 1602 (1991). It concludes that Solar should have been found currently financially qualified.

11. Discussion. Solar's application is governed by the Commission's 1981 financial certification standards which were designed to expedite the processing of applications by permitting applicants to certify, rather than document, their financial qualifications. *Revision of Form 301*, 50 RR2d 381, 382 ¶ 6 (1981). The Commission did not, however, change its financial requirements when it adopted the certification procedure. *Id.* An applicant must have reasonable assurance of sufficient funds to construct the station and operate it for three months without reliance on revenue at the time it certifies. To prove reasonable assurance, "the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). Furthermore:

> To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing sufficient net liquid assets on hand, or committed sources of funds....
>
> Probative evidence necessarily includes something more than the self-serving uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds....

> Where the lender is not a financial institution but a person... the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time....[A] balance sheet or... financial statement demonstrating that, at the time of certification, the person had sufficient net liquid assets to meet his commitment to the applicant would be clear evidence to support the certification.

*Id.; see Armando Garcia*, 3 FCC Rcd 1065, 1066 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 4767 (1988).

12. The above primer on rudimentary Commission financial requirements at the time Solar filed its application stands in stark contrast to the steps the applicant actually took at that time. Although it would dismiss as mere confusion the inconsistent statements and incomplete understandings of its three principals as to what their estimated costs were and how they hoped to meet them, Solar, of course, had the burden of proving its financial qualifications and it failed utterly to do so. *Cf. Victorson Group, Inc.*, 6 FCC Rcd 1697, 1700 (Rev. Bd. 1991). For example, as to its estimated costs, in addition to the significant and unresolved disagreement between Hinton and Huguez as to how high Solar's prosecution costs could go, and Manriquez's shifting understanding as to how Solar would meet these costs, Huguez's equivocal testimony is not reassuring that the Solar principals understood their overall costs were not higher than $2 million and that this figure was not just a budget number for FCC certification purposes. Thus, the following excerpts from Huguez's testimony are instructive:

> Q. Did you rely upon a total estimated cost of construction, operation and prosecution of $2,000,000?
>
> A. Yes.
>
> Q. Now from that time in 1984, that you relied upon that and your '84 financial certification to the present time, has that $2,000,000 estimate changed?
>
> A. No, it has not.

(Tr. 2906).

* * *

> Q. And do you recall that this is a letter that you wrote on or about July 8th, 1986, to Brenda Bell?
>
> A. Yes.
>
> Q. And this document was an update on your case, was it not?
>
> A. Yes.
>
> Q. Did you indicate to Ms. Bell that your estimated costs of constructing and operating the station would be in excess of 2.5 million dollars?
>
> A. It states that we will need to finance construction at around 2.5 million dollars.

(Tr. 2908).

* * *

> Judge Luton: Mr. Huguez, you testified a moment ago that Solar's estimate for construction and operation costs was at $2,000,000?
>
> The Witness: Yes.
>
> Judge Luton: And that has not changed?
>
> Now I think what we have gone through here seeks to understand why you were able to represent to Brenda Bell the need to finance construction of the station at two and a half million dollars, if Solar's estimate hadn't changed.
>
> Can you answer that?
>
> The Witness: Your Honor, I wish I could answer that precisely. I don't know why I would have said 2.5 as opposed to $2,000,000.

(Tr. 2911-12).

* * *

> Q. Now, having as you said a moment ago, reflected on all of this now can you tell us why you chose to tell one of your investors 2.5 million for construction costs, when, in fact, you are telling us you had made a representation to the FCC, based on something different?
>
> A. In my opinion, the cost of $2,000,000 and 2.5 million dollars was within a very close range and it was a choice I made to use 2.5 million.

(Tr. 2957).

The ALJ's conclusion that inconsistencies such as these undermined confidence that Solar had made "serious and reasonable" efforts to ascertain its costs prior to certification is thus well-founded.

13. Even were we to accept, however, Solar's contention that its principals agreed on the bottom line cost figure, it nevertheless failed to provide "substantial and reliable evidence", as required, that it had funds on hand or from committed sources to meet its needs. In this regard, Solar's efforts in actual fact amounted to little more than uncorroborated assurances that either it, or counsel acting on its behalf, took the necessary steps to secure the required funds. As noted, Solar looked to Applebaum, a client of its communications counsel, to, in one form or other, provide financial backing. But Applebaum was largely unknown to the three Solar principals at the time of certification. None of them had seen any financial information about him or taken any steps to ascertain if he had the financial wherewithal to fund their proposal. Hinton, who executed the application, had never met Applebaum. The principals also had varying expectations of how exactly Applebaum would meet their costs, and apparently no firm understanding, let alone agreement with him, as to what actual form his commitment would ultimately take. Insofar as reliance was placed on the pos-

sibility that Applebaum would assist with an equipment lease. Huguez never sent an equipment list to Applebaum and did not know what the terms of such a lease would be. To the extent the Solar principals expected Applebaum to finance the proposal out of his own assets (which expectation is contradicted by Hinton's testimony that Solar believed it would need a bank loan), they had only counsel's assurance he could do so for they had seen no evidence of his financial ability. And, despite Solar's contention to the contrary, such an *ipse dixit* was insufficient. As indicated earlier, the Commission expressly requires that an applicant relying on an individual, rather than a financial institution, have documentation in the form of a balance sheet or financial statement to evidence the lender's financial ability. *See Texas Communications Limited Partnership*, 7 FCC Rcd 3186, 3187 (1992), *aff'd sub nom. CHM Broadcasting Limited Partnership v. FCC*, 24 F.3d 1453 (D.C. Cir. 1994); *Aspen FM, Inc.*, 6 FCC Rcd at 1603; *Short Broadcasting Co., Inc.*, 8 FCC Rcd 5574 (Rev. Bd. 1993). No such documentation was provided Solar's principals. Nor were terms ever discussed with them or agreed upon for such a loan. Solar's understanding with Applebaum thus fell far short of the Commission's insistence that the applicant must have a commitment from a funding source demonstrating a "firm intention" to make the funds available for the construction and operation of the proposed station. *See Swan Broadcasting Limited*, 8 FCC Rcd 4208, 4210 (1993); *accord Peter Joseph Devlin and Patricia Eve Devlin*, 7 FCC Rcd 2499 (Rev. Bd. 1992) (sufficient dialogue to establish "present firm intention" to lend funds is necessary), citing *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980).

14. Solar's *post hoc* argument that it ultimately obtained a bank loan in 1988 with Applebaum's backing is equally unavailing. If Solar's true intention at the time it filed its application was to rely on a bank loan, under governing Commission law it should have obtained a reasonable assurance letter from the proposed lender at that time demonstrating the usual indicia of committed funding. *See, e.g., Liberty Productions, A Limited Partnership*, 7 FCC Rcd 7581, 7584 (1992); *A. P. Walter, Jr.*, 6 FCC Rcd 875, 877 (Rev. Bd. (1991); *Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973). Of course, it did not do so. Moreover, contrary to the argument implicit in Solar's position, it is not the Commission's duty to divine which of several possible alternative routes an applicant will eventually pursue to obtain financing, but the applicant's obligation, at the time of certification, to establish its financial wherewithal. Here, absent any specific written or oral understanding between it and Applebaum delineating a financial plan, and absent direct evidence of his financial condition at the time, Solar was simply not in a position to satisfy the aforenoted Commission standards and to certify to its financial readiness in 1984. Whether or not, as the ALJ found, its certification was knowingly false, it is clear that objectively Solar was financially unqualified *ab initio*, and for that reason alone, its application was properly denied. *See CHM Broadcasting Limited Partnership v. FCC*, 24 F.3d at 1458 (reasonable assurance must be based on "objective information").

15. Finally, we must summarily reject Solar's contention that the ALJ erred in declining to accept its current financial showing because the Commission's departure from its previous practice of liberally accepting financial amendments has not been adequately justified. In *Aspen FM*, cited by Solar, the Commission took pains to explain that its liberal amendment policy changed with the adoption of the certification procedure in 1981. Because of the potential for abuse inherent in the certification process, the Commission shifted its focus to first determining the validity and substance of the applicant's original financial proposal at the time of certification. The Commission's consistent policy has thus been that an applicant may not rely on a modified financial proposal to meet an issue against it in the absence of a showing that it had reasonable assurance of financing when it filed its application. *Id.* at 1603, and cases cited therein; *Opal Chadwell*, 4 FCC Rcd 1215, 1217 (1989); *Sunshine Broadcasting, Inc.*, 6 FCC Rcd 5981, 5982 (Rev. Bd. 1991). We will not rehearse this matter further because the Board is, of course, bound by the Commission's established policy. For all the above-stated reasons, Solar's application must be denied.

**MISSION**

16. Background. To establish its financial qualifications, Mission relies on a $2,000,000 loan commitment from the Crocker National Bank. According to Floyd D. Little, Mission's president, the applicant received assurance of the loan in a 1984 meeting at the bank between Little, John Adams, Crocker's Santa Barbara business branch manager, and Patrick D. Caswell of the bank's commercial loan department, who worked with loans of $500,000 or more. Little first met with Adams in his office to discuss the proposed television project. He testified that Adams was "very enthusiastic" about the idea and said it would be good for the bank to have a local TV station as a client. Little then was introduced to Caswell in the latter's office where the three men spoke for five to ten minutes, after which Adams left. Little told Caswell about the available television channel and said that the station would be owned by local investors. Little did not remember discussing any specific investor names or showing Caswell a list of stockholders. Little informed Caswell that the estimated costs of the proposal were close to $2,000,000. Although in his direct testimony Little stated he discussed Mission's budget and showed Caswell their cost estimates, at the hearing he admitted he could not recall showing him any particular document. Neither man raised the question of what the bank's credit terms were. According to Little, Caswell did not ask many questions and neither he nor Adams told Little what they required in order to give a commitment. Little told Caswell that he would need a letter confirming reasonable assurance of the loan and that counsel would speak to him about the details. *SID II*, paras. 4-6; Mission Exhs. S-1, S-2; tr. 3016-17, 3021-24, 3026, 3039, 3047.

17. Caswell knew that Little had been a good customer of the bank for several years and, specifically, that Little's Lincoln-Mercury dealership had done substantial business with the bank and, furthermore, that Little had a good credit history. Little left the bank believing he had received a commitment for the stated amount and would receive a confirming letter, and Caswell believed he and Adams had given Little "every reason to believe" he would receive such a letter. *SID II*, para. 7; Mission Exh. S-2; tr. 3094.

18. Little stated that the bank meeting occurred prior to July 18, 1984, the date he signed the Mission application containing the financial certification. He was sure of this because he was aware that he had to have a loan commitment before he signed. *SID II*, para. 8; tr. 3100. The minutes of Mission's first organizational meeting and of

two board of directors meetings in the summer of 1984 were also introduced into evidence. There is no mention of any bank financing, or effort to obtain any, in the minutes of the organizational meeting held July 16, 1984. *SID II*, para. 14; Solar Exh. S-2. The minutes of the August 7, 1984 board meeting state:

> 5. Loan commitment. Floyd Little has contacted Crocker Bank for the purpose of securing a "letter of intent" from the bank to loan the corporation [$2,000,000].

*SID II*, para. 9; Solar Exh. S-1.

The minutes of the next board meeting, held August 14, 1984, state:

> 4. Floyd Little reported that he had secured a loan commitment from Crocker National Bank.

*SID II*, para. 9; Mission Exh. S-4.

19. On August 23, 1984, Robert L. Thompson, who was then Mission's counsel, wrote Caswell asking for a "letter of intent". Mission Exh. S-3. On August 28, 1984, Caswell responded as follows:

> RE: Mission Broadcasting Corp.
>
> Dear Mr. Thompson:
>
> Mr. Floyd Little has been a valued customer of the Crocker Bank, Santa Barbara, California, since 1982. All personal as well as business accounts have been maintained in a satisfactory manner.
>
> The Crocker Bank would be willing to entertain future credit requests that Mr. Little may have.
>
> Cordially yours,
>
> Crocker National Bank
>
> Patrick T. Caswell
>
> Associate Account Manager

*SID II*, para. 10; Coast Exh. S-3.

20. Caswell testified that the letter reflected the bank's attempt "to be as vague as possible." He further stated that bankers try "to cover the bottoms very carefully...[so that] the first time in many cases you shoot out the vaguest [letter possible] and... that's what we did here." SID II, para. 17; tr. 3137. Although Mission's counsel rejected the letter as "too vague", tr. 3041, Little was not overly concerned because Mission's certification was not based on the letter itself but "on a commitment from Mr. Caswell and Mr. Adams that should we win the CP and we fulfilled the credit criteria, the bank would loan Mission $2 million." *SID II*, para. 10; tr. 3059.

21. On August 31, 1984, the bank issued a second letter to Mission which, at counsel's request, was addressed to him. It stated:

> Dear Mr. Thompson:
>
> The Crocker Bank (the Bank) could provide $2,000,000 in loans to Mission Broadcasting Corporation (the Corporation) for the purpose of constructing a television station in Santa Barbara, California.
>
> Subject to the foregoing, our willingness to lend this amount to the Corporation would be contingent upon the following and not limited to:
>
> 1. The Corporation successfully obtains approval from the Federal Communications Commission (FCC) to construct and operate such television station in the Santa Barbara area.
>
> 2. (a) All reasonable and ordinary credit criteria of the Bank are met by the Corporation, (b) the Corporation receives a construction permit, (c) the Corporation requests a lending commitment from the Bank, (d) the Corporation executes all customary documentation normally required by the Bank for credits of this type, including opinions of attorneys and accountants, and guarantors and collateral documents acceptable to the Bank.
>
> Cordially yours,
>
> Crocker National Bank
>
> Patrick T. Caswell
>
> Associate Account Manager

*SID II*, para. 11; Mission Exh. S-1, Att. 1.

Because the proposed loan involved a large sum of money, Caswell consulted with his regional supervisors and the bank's lawyers in preparing the letter. *SID II*, para. 11; tr. 3135-36, 3161-62.

22. Caswell stated that this letter was intended to show the bank's willingness to make the loan to Mission. That is, the letter was intended to "assist Mission in meeting the FCC financial qualifications standards but not to be legally binding on the bank." Specifically, he stated that because no formal loan request was being made by Mission, "there was no need to make a more detailed commitment" or to state "an interest rate and specific repayment/collateral terms." Nor did the bank wish to be bound to make the loan at some unknown time in the future. *SID II*, para. 12; tr. 3130; Mission Exh. S-2.

23. The ALJ concluded that, although the documentary evidence could be read to suggest the contrary, he would accept Little's uncontradicted testimony that he met with Crocker Bank officials to obtain a commitment prior to July 18, 1984. If Crocker Bank did make a commitment at that time, the ALJ further stated, it was to Little personally and only incidentally to the applicant. The wording of the first Crocker Bank letter and Caswell's cautionary testimony support this interpretation, the ALJ held. The ALJ further found that the second Crocker Bank letter did not meet the specific standards set forth in *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd.

1990), and that Mission's reliance on an oral commitment from the bank officials rather than the second bank letter is equally unavailing because no specific terms were discussed at the bank meeting either. The ALJ concluded that because Little's purpose was to obtain a loan on behalf of Mission, and because he reasonably believed he had done so at the Crocker Bank meeting, his July 18, 1984 certification was not false. Nevertheless, because the bank's focus was primarily on Little and only secondarily on Mission, the ALJ ultimately concluded that the assurance of financing received did not meet Commission standards and that Mission was therefore not financially qualified. *SID II*, paras. 24-25.

24. In its exceptions, Mission argues that the bank's commitment was originally stated orally to Little and then followed by a letter to counsel for the applicant. Mission claims that the bank knew it was dealing with a corporate project, that its second letter referred several times to the corporation, and that Caswell testified that the bank wanted the new client. Specifically, Mission states, the bank made the commitment to Mission because of Little's involvement in it, and its relationship with Little was a sufficient basis to infer reasonable assurance of the loan. It also argues, placing primary reliance on *Annette B. Godwin*, 8 FCC Rcd 4098, 4101 (Rev. Bd. 1993), that the Commission should not second-guess the banker's judgment. Moreover, Mission claims, where the banker testifies directly at the hearing that he is willing to make the loan, as Caswell did here, it is not necessary under *Scioto* to inquire further whether the applicant has reasonable assurance of financing in the form of agreement on tentative terms.

25. Discussion. Before addressing the substance of Mission's financial qualifications, we first consider whether the applicant met its burden of establishing that its claimed financing was in place at the time it certified. *See Aspen FM*, 6 FCC Rcd at 1603 (applicant may not certify its financial qualifications and then obtain financing). The ALJ somewhat reluctantly accepted Little's testimony that the Crocker Bank meeting upon which Mission relies occurred prior to July 18, 1984, the date he certified the application, and we can understand the ALJ's hesitancy. Little's memory of the 1984 events was admittedly quite hazy and neither he nor Caswell could confirm the date of the meeting. Moreover, the documentary evidence does not reflect that the commitment was obtained as early as Little claimed. The minutes of the contemporaneous organizational meeting of July 16 contain no reference whatever to any on-going or impending attempt to obtain financing, whereas the minutes of the August 7 board meeting mention for the first time that Little has contacted the bank for a "letter of intent" and give no indication that a commitment has been received. It is only at the next board meeting on August 14 that it is recorded Little has secured the commitment Solar claims was obtained almost a month earlier. And the Crocker Bank letter of August 28, purportedly the object of Little's visit to the bank, did not come until a full forty-one days after the July 18 certification. In the absence of corroborative evidence, there is at least the strong implication from these documents in the record that the bank meeting may have occurred after the application was certified. The ALJ, who observed Little's testimony, chose to accept his statement as truthful largely because it was uncontradicted by any other witness testimony. We need not resolve this apparent conflict because even if we assume, *arguendo*, that Little's version of events is reliable, we are in agreement with the ALJ that Mission has otherwise failed to establish its financial qualifications and that its application should be denied.

26. In assessing reasonable assurance based on a bank loan commitment, we have held:

> Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committedh) sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with the financial information (*e.g.*, collateral guarantees), that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial insttitution is that the "individual qualifications" of the borrower have been preliminarily reviewed, that adequate collateral has been demonstrated, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. [Citations omitted].

*Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991). And the Commission, citing *Scioto*, has stated:

> [O]ur concern is whether a bank letter affords reasonable assurance of committed funding to construct the proposed facility and operate for three months without station revenues. To determine reasonable assurance of a bank loan, we generally consider the following factors: whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower.

*Liberty Productions, A Limited Partnership*, 7 FCC Rcd 7581, 7584 (1992).

27. Applying the foregoing principles to this case, we conclude that the ALJ correctly found that any commitment from Crocker Bank was primarily made to Little as an accommodation and did not reflect an adequate exchange of information between Mission and the bank or a meeting of the minds on relevant loan terms. In these circumstances, an informed decision by the lender to advance the funds and by the borrower to accept the lender's terms was not possible. Mission's reliance on *Multi-State Communications, Inc. v. FCC*, 590 F. 2d 1117, 1118 (D.C. Cir. 1978), for the proposition that the bank's familiarity with Little personally should have been sufficient to support Mission's qualifications, is unpersuasive. In *Multi-*

*State*, reasonable assurance was established despite the absence of specific collateral terms where the bank was "personally and favorably acquainted with several of the [applicant's] stockholders." There, however, by contrast to this case, a bank letter, filed contemporaneously with the application, expressed a specific willingness to make a loan and provided specific interest rate and repayment provisions. No such specific loan commitment on behalf of Crocker Bank was made during the pre-certification discussion with Little or in its subsequent letters.

28. Thus, to the extent that Little's claimed purpose in visiting the bank was to secure a commitment letter for Mission from the bank, neither of the letters he obtained came remotely close to satisfying Commission standards. The first letter, concededly intended to be "as vague as possible" by its author, Caswell, does not even mention the applicant's proposal or indicate it is meant to provide a promised loan to Mission to finance that proposal. The second letter, designed to be more specific, while stating the amount and purpose of the loan, contains none of the usual basic terms and conditions such as collateral requirements and tentative repayment period and interest rate. *See A. P. Walter, Jr.*, 6 FCC Rcd at 877.

29. Although Mission argues that its loan commitment was not based exclusively on the letters but was obtained at Little's bank meeting with Adams and Caswell, the minutes of the August 7 Mission board meeting indicate that in fact the purpose of Little's visit to the bank was to obtain a reasonable assurance letter. And Little informed Caswell at their meeting that he would need such a letter. Nevertheless, as the ALJ concluded, reliance on the meeting is also unhelpful to Mission because there was no discussion of or agreement as to terms there either. Beyond expressing an interest in having a local television station as a client, the bankers apparently did not inquire as to who the local owners would be, did not discuss credit terms with Little, asked few questions, and did not explain what they needed in order to provide a commitment. It cannot be concluded that this meeting produced specifically identified loan terms that were agreeable to both borrower and lender. *See Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990) (reasonable assurance not established where applicant relied on pre-certification conversation between non-voting stockholder and friend at bank and, *inter alia*, banker did not request and principal did not furnish financial statements or other documentation routinely required from loan applicants, and identity of other members of applicant was not known).

30. Finally, we reject Mission's attack on the ALJ's traditional *Scioto* analysis on the ground that cases such as *Godwin* hold that where the banker expresses a willingness to make the loan, the Commission will not second-guess the banker's judgment by inquiring into whether there has been a meeting of the minds as to tentative loan terms. Mission's reliance on *Godwin* is misplaced. We will certainly not second-guess a banker's judgment where he issues a valid and substantive commitment letter, but here, as indicated, neither letter Mission received satisfied basic Commission standards for reasonable assurance. Moreover, unlike this case, in *Godwin*, the applicant supplied the bank with the ordinary loan request documentation and data, and specific terms were exchanged. Furthermore, Mission's view of the true meaning of *Scioto* is not supported by *Liberty Productions*, 7 FCC Rcd at 7584, where the Commission stated that its concern is "whether a bank letter affords reasonable assurance of committed funding", which, in turn, depends on whether the borrower's qualifications have been preliminarily reviewed, whether adequate collateral has been shown, and whether the tentative terms are identified and acceptable to both parties. As previously discussed, none of these fundamentals are present here, and *Godwin* expressly considered the *Liberty Productions* formulation to be a "condensation" of *Scioto*. *See* 8 FCC Rcd 4100, n.25. Thus, under governing Commission law, even where a bank has a previous relationship with a principal of the applicant, it must still discuss the projected terms for the loan, and Mission is incorrect that where the banker testifies he is willing to make the loan, it is not necessary to demonstrate that the applicant also has agreement on tentative terms. In short, we conclude that the record fully supports the ALJ's opinion that Crocker Bank was essentially "accommodating" its customer, Little, without a substantive commitment to Mission underpinning its letters. Accordingly, Mission must be found not to be financially qualified.

31. At this late stage, we will not extend this protracted proceeding to examine Coast's basic qualifications, as suggested by one of its opponents, because there has been no *prima facie* showing raising any substantial and material questions regarding Coast's qualifications. In the absence of such a showing, further inquiry is unwarranted.

32. ACCORDINGLY, IT IS ORDERED, That the Motions for leave to amend filed June 29 and September 9, 1994 by Mission Broadcasting Corporation ARE GRANTED, and the amendments ARE ACCEPTED; that the application of Coast TV (File No. BPCT-840720KG) for a construction permit for a new television station in Santa Barbara, California IS GRANTED; and that the applications of Mission Broadcasting Corporation (File No. BPCT-840723KI) and Solar Television, Inc. (File No. BPCT-840723KJ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-87**

In re Applications of

RAYMOND W. CLANTON — File No. BPH-911216MC

LOREN F. SELZNICK — File No. BPH-911216MD

For Construction Permit for a
New FM Station on Channel 279A
In El Rio, California

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 6, 1995; Released: March 16, 1995**

By the Review Board: MARINO (Chairman), and GREENE.

1. The two applicants in this case filed a Joint Request for Approval of Settlement Agreement on January 17, 1995, which was supplemented on January 18, 1995. The Mass Media Bureau supported the joint request in comments filed February 1, 1995, conditioned upon submission of an implementing amendment. That amendment was filed on February 27, 1995. Since the joint request as supplemented complies with the relevant Commission requirements discussed below, we will grant it.

2. In an *Initial Decision*, 9 FCC Rcd 6930, released November 10, 1994, Administrative Law Judge John M. Frysiak proposed to grant the application of Raymond W. Clanton (Clanton), who was found to be basically qualified, and to deny the application of Loren F. Selznick (Selznick), who was found to be financially unqualified. *Id.* at 6941.

3. Clanton and Selznick have submitted a settlement agreement which proposes the dismissal of Selznick's application, and the grant of Clanton's application for a new FM station in El Rio, California. By amendment, Clanton will transform his application from an individual to a corporate form, and will reimburse Selznick for $25,000 of her legitimate and prudent expenses. The parties also request that the *Initial Decision*, *supra*, be vacated in accordance with *Shawn Phalen*, 7 FCC Rcd 7638, 7639 (1992), where the Commission granted a similar request "to vacate findings and conclusions in the case." The recently-filed petition for leave to amend proposes to substitute the Clanton Corporation, which is 100% owned by Raymond W. Clanton, for the individual applicant Clanton. This petition also seeks to withdraw Clanton's integration commitment in accordance with Commission policy in comparative settlement proceedings.

4. As required by Section 73.3525 of the Commission's Rules, 47 CFR 73.3525, which implements the Communications Act of 1934, as amended, 47 U.S.C. 311(c)(3), the applicants have shown that: (a) the public interest will be served by approval of the agreement which will expedite resolution of this proceeding; (b) their applications were not filed for purposes of reaching or carrying out a settlement agreement; and, (c) the proposed reinbursement will not exceed Selznick's legitimate and prudent expenses. Additionally, Commission policy discussed by this Board in two recent cases justifies (d) the request to vacate the findings and conclusions in this case, *see Frank Digesu, Jr.*, 9 FCC Rcd 7866, at ¶ 7 (Rev. Bd. 1994); and (e) Clanton's request to withdraw his integration proposal, *see also Riverton Communications Company, Inc.*, 10 FCC Rcd 524 at ¶ 6 (Rev. Bd. 1995).

5. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement filed on January 17, 1995, and supplemented on January 18, 1995, by Raymond W. Clanton and Loren F. Selznick IS GRANTED, and the agreement attached thereto IS APPROVED;

6. IT IS FURTHER ORDERED, That the petitions for leave to amend, filed on December 20, 1994 and on February 27, 1995, by Raymond W. Clanton ARE GRANTED, the amendments attached thereto ARE ACCEPTED; that Clanton Corporation is substituted as the applicant; and, that the *Initial Decision*, 9 FCC Rcd 6930 (1994), IS VACATED; and,

7. IT IS FURTHER ORDERED, That the application of Loren F. Selznick (File No. BPH-911216MD) IS DISMISSED; that the application of Clanton Corporation (File No. BPH-911216MC) IS GRANTED; and, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of the Application of

FUGRO-CHANCE, INC.

| | |
|---|---|
| For Blanket Authority to Construct and Operate a Private Network of Receive-Only Mobile Earth Stations | File Nos.3475-DSE-P/L-93 3476-SSA-93 Call Sign: E930503 |

**ORDER AND AUTHORIZATION**

**Adopted: March 6, 1995; Released: March 16, 1995**

By the Chief, International Bureau:

1. Fugro-Chance, Inc., now John E. Chance & Associates, Inc. ("Chance"), requests a waiver of Section 2.106 of the Commission's Table of Frequency Allocations, 47 C.F.R. § 2.106, so that it may construct and operate a private network of approximately 250 receive-only mobile earth stations using frequencies in the 3700-4200 MHz band. This frequency band is allocated to the fixed-satellite service and fixed-terrestrial service on a shared basis. There is no allocation for mobile-satellite service in this band. Chance's mobile earth stations would be located aboard offshore vessels operating within domestic U.S. waters, and would receive data from the GTE Spacenet satellite system while the vessels are in motion.

2. In general, use of the radiocommunication frequencies in the United States must be in accordance with the Table of Frequency Allocations contained in Section 2.106 of the Commission's rules. We have, however, permitted non-conforming uses when there is little potential for interference into any service authorized under the Table of Frequency Allocations and when the non-conforming operator accepts any interference from authorized services. For example, we allowed mobile-satellite space-to-Earth transmissions in both the 3.7-4.2 GHz and the 11.7-12.2 GHz frequency bands although there is no allocation for mobile-satellite service in these bands.[1] We stated we saw no reason to prevent these transmissions "when a downlink transmission from a fixed-satellite appears identical regardless of whether it is being received by fixed or mobile terminals."[2]

3. In this case, Chance's operations will not cause interference into the fixed-satellite service, the terrestrial fixed-service, or any other service authorized to operate in the 3700-4200 MHz band. Chance will be using an existing satellite, and Chance's operations will not alter either the footprint or the power of downlink transmissions from this satellite. Although these downlink transmissions are currently being received by fixed terminals, no technical problems will arise if Chance's mobile earth stations are also authorized to receive them. In addition, authorization will allow Chance to provide positioning services in connection with the exploration for and production of petroleum products in offshore areas of the United States. Consequently, we grant the waiver of Section 2.106 of the Commission's Table of Frequency Allocations.

4. Accordingly, IT IS ORDERED, pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261, that File Nos. 3475-DSE-P/L-93 and 3476-SSA-93 ARE GRANTED and John E. Chance, Associates, Inc., IS AUTHORIZED to construct and operate a private network of up to 250 receive-only mobile earth stations using frequencies in the 3700-4200 MHz band, subject to the following conditions:

a) No harmful interference shall be caused into any authorized service that is in compliance with the Table of Allocations, either domestically or internationally, in the 3700-4200 MHz frequency band (see 47 C.F.R. § 2.106), and Chance shall immediately cease mobile operations upon notification of interference into any of these services;

b) Chance, as a non-conforming user of the frequency band, must accept any interference from any service authorized to use the 3700-4200 MHz band; and

c) Chance shall maintain a point of contact who can arrange to remedy any interference problems immediately or to terminate operations if necessary. Chance shall submit the name and telephone number of the contact within 30 days of the release of this order;

5. Chance is afforded thirty days from the date of release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[1] Qualcomm, Inc., 4 F.C.C. Rcd. 1543 (1989); Geostar Positioning Corp., 4 F.C.C. Rcd. 4538 (1989).
[2] Qualcomm, Inc., 4 F.C.C. Rcd. 1543 (1989), at ¶ 12.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Petition for Reconsideration
Concerning Liability of Benito Rish,
Licensee of Radio Station
WREM(AM), Monticello, ME

For a Forfeiture

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 9, 1995; Released: March 16, 1995**

By the Commission:

1. The Commission has under consideration (1) a $10,000 forfeiture order[1] issued September 16, 1992, to Benito Rish, licensee of Station WREM(AM), Monticello, Maine; and (2) the licensee's October 16, 1992, petition for reconsideration of the forfeiture order.

2. The forfeiture was assessed for violation of 47 U.S.C. § 310(d), which prohibits the transfer of control of any broadcast station without prior Commission approval, and 47 C.F.R. § 73.3613, which requires the timely filing of certain documents pertaining to station control. The licensee, for the first time represented by counsel in these proceedings, makes three arguments in support of reduction or rescission of the forfeiture.[2]

3. The licensee first argues that the unauthorized transfer of control at issue in this case was, for purposes of applying the "Commission's forfeiture guidelines,[3] erroneously classified as a "continuing" violation. The licensee contends that, "in its nature, an unauthorized transfer cannot be a continuing violation." The licensee further submits that the unauthorized transfer of WREM was effectuated by a "single occurrence, fixed in time," in the licensee's previous license term. Accordingly, it is argued, the May 17, 1991, Notice of Apparent Liability (NAL), issued more than one year after the violation occurred, is precluded by the statute of limitations, 47 U.S.C. § 503(b)(6), from reaching such conduct.

4. Commission precedent amply demonstrates that an unauthorized transfer of control is treated as a continuing violation. *See, e.g., Cate Communications Corp.*, 60 RR 2d 1386 (1986); *Galesburg Broadcasting Co.*, 6 FCC Rcd 2210 (1991); *New West Broadcasting Systems, Inc.*, 7 FCC Rcd 5556 (MMB 1992); *Mountain Signals, Inc.*, 6 FCC Rcd 2874 (MMB 1991) (Notice of Apparent Liability), *aff'd* 7 FCC Rcd 3970 (MMB 1992) (Forfeiture Order). In these cases, as in the one before us, the licensee at some point relinquished control of the station to an unauthorized party and continued to allow such unauthorized control every day until Commission authorization or some other event brought it to an end.

5. Moreover, the legislative history of the 1989 amendment to Section 503 of the Communications Act[4] shows that Congress ratified the Commission's longstanding approach to this type of violation by characterizing an unauthorized transfer of control that results from a single event as an offense that is nonetheless continuing in nature. The House Report accompanying the statutory amendment states,

> For example, if an unauthorized transfer of control of a broadcast license is accomplished by the sale of stock, the sale is a one-time, continuing violation for each day that the parties fail to obtain the necessary authorization. In this case, the $250,000 cap would apply.[5]

The implementation of Rish's lease agreement with ARK Communications, which accomplished an unauthorized transfer of control in a manner directly analogous to the sale of stock in the above example, is a one-time, continuing violation that ended only when Rish resumed control of the broadcast facility. The violation thus continued until Rish's corrective action. Although the violative conduct began outside the bounds of our forfeiture authority, that does not undercut our ability to impose a fine for the days that the violation continued within the statutory period preceding the May 17, 1991, NAL.[6]

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[1] *See Liability of Benito Rish*, 7 FCC Rcd 6036 (1992); *see also By Direction Letter*, 6 FCC Rcd 2628 (1991) (Notice of Apparent Liability).

[2] The petition urges that these facts and issues be examined on reconsideration "as justice may require," citing 47 U.S.C. § 503(b)(2)(D) and 47 C.F.R. § 1.106(c)(2).

[3] The forfeiture amount in this case was not based on our forfeiture guidelines. *See Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339, *revised*, 8 FCC Rcd 6215 (1993) ("Policy Statement"). Accordingly, the court opinion setting aside these guidelines, *United States Telephone Assn. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994), has no impact on this case. To the extent the forfeiture order cited the guidelines in rejecting some of the licensee's earlier arguments for reduction or rescission, the underlying principles are well-established legal precedent that predate the guidelines and therefore remain valid.

[4] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989) (amending 47 U.S.C. § 503(b) as well as other sections of the Communications Act of 1934).

[5] Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[6] Although WREM's license term expired on April 1, 1991, the Commission had not at the time of the NAL granted the licensee's November 19, 1990, application for license renewal. Because there was no intervening renewal to activate the one-year limitation provided for in 47 U.S.C. § 503(b)(6), the NAL could legally reach conduct as old as three years at the time it was issued. *See United States v. Evergreen Media Corp. of Chicago, AM*, 832 F. Supp. 1179 [73 RR 2d 1442] (N.D. Ill. 1993). Accordingly, Rish's conduct from May 18, 1988, to May 17, 1991, was subject to forfeiture under the May 17, 1991, NAL. We note that although § 206 of the Telecommunications Authorization Act of 1992 subsequently extended the statute of limitations for forfeiture proceedings, *see* Pub. L. No. 102-538, 106 Stat. 3533 (approved October 27, 1992), it does not affect our determination here.

6. Having reached this conclusion, we find it unnecessary to address the licensee's second argument, that under a proper analysis only Rish's continuing failure to file the ARK agreement is subject to a forfeiture penalty, in an amount substantially lower than the one assessed. The licensee's third argument for reduction of the $10,000 forfeiture amount is based on WREM's financial condition as "a struggling, unprofitable small-market AM station." The WREM profit and loss statements submitted by Rish in his petition for reconsideration allegedly show that he lost money on the lease,[7] losses which, as he puts it, subsidized ARK's religious programming. ARK, which allegedly sustained the bulk of WREM's losses as the unauthorized transferee, has submitted figures ("Summary Statement of Operations for 1988, 1989 & 1990") which, according to ARK, show that the station was not profitable under its unauthorized control. By these and other figures relating toWREM's income, Rish attempts to demonstrate that the station was and is a marginal operation, and that "no one benefitted from it [the misconduct] financially."

7. While the unlawful activity may not have resulted in any party's unjust enrichment, the failure to profit from a wrong is not ordinarily a basis for a forfeiture reduction. *See, e.g., Laury Associates, Inc.*, 21 RR 2d 203 (1971); *Lawrence Broadcasters, Inc.*, 14 RR 2d 1 (1968). Nevertheless, WREM is a 5,000 watt directional daytime-only radio station licensed to a community of 425. These factors suggest an inherently low station value. WREM is also the only station licensed to Monticello.[8] Given these circumstances, as well as the apparently unprofitable history of the facility, we believe a forfeiture of $2,500 would adequately deter future misconduct.

8. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Benito Rish on October 16, 1992, IS GRANTED to the extent indicated herein and DENIED in all other respects. Benito Rish, licensee of Radio Station WREM(AM), Monticello, Maine, is HEREBY ORDERED TO FORFEIT to the United States the sum of two thousand five hundred dollars ($2,500) for violation of Section 310(d) of the Communications Act and Section 73.3613 of the Commission's Rules. Payment may be made in accordance with the instructions previously provided.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[7] We note that the losses claimed by Rish include depreciation for WREM's broadcast and studio equipment. Since depreciation does not affect cash flow, it is not clear that the lease arrangement resulted in a cash loss to Rish.

[8] We also note that Rish owns no other broadcast stations.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-608**

In re applications of

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|---|---|
| ELINOR LEWIS STEPHENS | File No. BPH-880714ML |
| AUGUST COMMUNICATIONS GROUP, INC. | File No. BPH-880714MN |
| GRASS ROOTS RADIO, INC. | File No. BPH-880714NJ |

For Construction Permit for a
New FM Station on Channel 290C
in Round Rock, Texas

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 7, 1995; Released: March 16, 1995**

By the Commission:

1. We have before us a motion for leave to file an application for review and an application for review, both filed by August Communications Group, Inc. on September 30, 1994 and corrected on October 3, 1994, and an opposition, filed by Elinor Lewis Stapleton on October 6, 1994. The application for review appeals from a memorandum opinion and order released on September 23, 1994, in which the Review Board dismissed an appeal from an interlocutory ruling by the ALJ. *Elinor Lewis Stephens*, 9 FCC Rcd 5259.

2. It appears from undisputed assertions in the Board's opinion and in the pleadings before us that the pertinent circumstances are as follows. This case was designated for hearing under a standard comparative issue and issues concerning the basic qualifications of two of the three remaining applicants. An evidentiary hearing has been conducted, and the parties submitted proposed findings and conclusions in September 1992, but the ALJ has refrained from issuing an initial decision. He denied a request from August to issue an initial decision resolving the non-comparative issues because he concluded that the Commission's public notice, "FCC Freezes Comparative Proceedings", 9 FCC Rcd 1055 (1994), precluded issuance of initial decisions unless consideration of the applicants' comparative qualifications is unnecessary for resolution of the case. FCC 94M-394, rel. June 8, 1994. He also denied a motion by August for leave to appeal that interlocutory ruling pursuant to 47 C.F.R. §1.301(b). FCC 94M-430, rel. July 1, 1994. August subsequently filed another motion for leave to appeal the ruling, addressing the second motion to the Review Board.

3. In considering the request, the Board noted at the outset that Subsection 1.301(b) states that appeals from an ALJ's interlocutory ruling (other than rulings that are appealable as a matter of right under Subsection 1.301(a), which is of no pertinence here) shall not be filed without the ALJ's permission. The Board asserted that it could not properly entertain an unauthorized interlocutory appeal unless the appellant has shown either that the ruling in question stemmed from egregious error or a flagrant abuse of discretion or else that a vital and far-reaching public interest is at stake that could not otherwise be adequately protected. After summarizing August's argument that the freeze order did not bar the ALJ from issuing a partial initial decision on the non-comparative issues, the Board held that August had not shown that the ruling in question resulted from an abuse of discretion. Hence, it denied the motion for leave to file and dismissed the interlocutory appeal.

4. August now asks us to entertain an appeal from the Board's ruling. We are not persuaded, however, that good cause has been shown for doing so. To begin with, we note that although 47 CFR §1.115(e)(1) provides that appeals from interlocutory rulings by the Board may generally be filed only in the context of applications for review from final Board decisions, August says nothing concerning that provision in its pending pleadings. As regards Section 1.301, August admits that the ALJ's denial of its motion is not within any of the categories of rulings that are appealable on an interlocutory basis as a matter of right, as delineated in 47 CFR §1.301(a), but argues that its appeal should be accepted because the ruling is analogous to Subsection 1.301(a) rulings in that the asserted advantages of granting the motion would be lost if review is postponed until exceptions are filed. Most rulings of the kinds mentioned in Subsection 1.301(a), however, are prejudicial to litigants' interests and their adverse effects either cannot be cured by review in the ordinary course or cannot be cured in that way without ordering a rehearing, at considerable additional cost to the appellant and others. The same cannot be said of the ALJ's refusal to issue a partial ID, which did not place any party at a disadvantage relative to its adversaries or cause it to incur greater litigation expense. Subsection 1.301(b) gives plain expression, moreover, to a policy against allowing interlocutory appeals unless correction of an error in the ruling would necessitate a remand should review be postponed pending the filing of exceptions, and it also explicitly states that a refusal by the presiding officer to grant permission for interlocutory appeal of a ruling not subject to appeal as of right is final. August's motion for leave to file an appeal, which does not purport to raise any question of abuse of discretion, does not persuade us to make an exception to those codified policies.

5. ACCORDINGLY, IT IS ORDERED that the Corrected Motion for Leave to File Application for Review filed on October 3, 1994 by August Communications Group, Inc. IS DENIED and that the corrected application for review filed by August Communications Group, Inc. on the same date IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-44**

In the Matter of

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|---|---|
| Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (East Los Angeles, Long Beach, and Frazier Park, California)[1] | RM-7123<br>RM-7367 |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: March 7, 1995; Released: March 17, 1995**

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* (*"Notice"*) in the above-docketed proceeding, 5 FCC Rcd 956 (1990), which proposed, at the request of Spanish Broadcasting System of Florida, Inc. ("SBSF"), licensee of Station KLAX-FM (formerly KSKQ-FM), Channel 250B (97.9 MHz), Long Beach, California, the reallotment of Channel 250B to East Los Angeles, California, and the modification of its license accordingly (RM-7123). Richard A. Cramer ("Cramer") filed a counterproposal (RM-7367) to allot Channel 251A (98.1 MHz) to Frazier Park, California as its first local service, which he subsequently withdrew.[2] SBSF, KiFM Broadcasting Limited Partnership ("KiFM"), licensee of Station KIFM(FM), Channel 251B, San Diego, California, and Robert Burdette Investments ("RBI"), licensee of Station KBOB-FM, Channel 252A (98.3 MHz), West Covina, California filed comments. Antelope Broadcasting Co., Inc. ("Antelope"), licensee of Station KAVS(FM), Channel 249A (97.7 MHz), Mojave, California, also filed comments. SBSF, KiFM, Eric R. Hilding ("Hilding"), and Michael T. McKenna ("McKenna") filed reply comments.[3]

**COMMENTS**

2. SBSF filed comments to the *Notice* reaffirming its interest in the proposed allotment. SBSF notes that East Los Angeles is located in Los Angeles County,[4] is listed as a Census Designated Place (population 126,379),[5] and possesses the requisite indicia of community status to warrant an FM channel allotment. SBSF reports that East Los Angeles has four full-service hospitals, many schools, including a community college and a campus of a four-year college, and two weekly newspapers, published in both English and Spanish. Additionally, SBSF observes that numerous recreational facilities serve the community, as well as myriad businesses ranging from fast food outlets to offices providing legal, medical and other professional services. Many of these businesses and other institutions reflect the fact that in East Los Angeles "94% of the residents are Spanish-speaking." SBSF argues that a local radio station could provide in "the residents' native language" emergency information, advertising, a forum for community opinion, and other information reflecting the predominantly Mexican culture. The reallotment of Channel 250B to East Los Angeles would provide for its first local aural transmission service and the movement of Station KLAX-FM from Long Beach (population 429,433) would leave that community with four aural transmission services.[6]

3. Comments regarding the technical operation of the proposal were directed to SBSF's proposed movement of the transmitter site Station KLAX-FM occupied at the time SBSF filed its petition ("old site"). Station KLAX-FM now operates at a different site ("existing site") still serving Long Beach. In its petition, however, SBSF proposed a relocation of its old site and license modification in order to serve East Los Angeles from another location ("proposed site").[7] SBSF also filed an engineering amendment to its comments illustrating that certain shadowing difficulties in operating at its old site would be overcome by relocating to the proposed site to serve East Los Angeles.[8]

4. KiFM, licensee of Station KIFM(FM), filed comments "strongly support[ing]" SBSF's proposal. KiFM argues that a site relocation of Station KLAX-FM promises "to virtually eliminate" the interference to Station KIFM(FM) arising from the fact that Station KLAX-FM is a grandfathered short-spaced station. KiFM also supported the relocation of the old site farther inland and away from the Pacific coast because it believes that the interference to the San Diego

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[1] The community of Frazier Park has been added to the caption.

[2] Accordingly, we will not further consider the Frazier Park counterproposal or any comments relating thereto and will dismiss the counterproposal. We also dismiss as moot SBSF's motion to strike Cramer's reply comments. Since Cramer withdrew his counterproposal prior to October 4, 1990, he was not required to demonstrate compliance with § 1.420(j) of the Commission's Rules.

[3] Hilding subsequently withdrew, with prejudice, his comments in support of the Frazier Park counterproposal. He now supports instead the East Los Angeles proposal.

McKenna filed an opposition to the East Los Angeles proposal after the time for filing reply comments had closed. He offered no reasons for its untimeliness nor did he request leave to file his opposition. We will not accept McKenna's comments and they will not be considered further in this proceeding.

[4] In addition, both East Los Angeles and Long Beach are within the Los Angeles Urbanized Area (population 11,402,946 according to the 1990 U.S. Census).

[5] Population figures are from the 1990 U.S. Census.

[6] The four stations licensed to Long Beach are: commercial Stations KNAC(FM), Channel 288A, and KGER(AM), 1390 kHz, and non-commercial Stations KLON(FM), Channel 201, and KFRN(AM), 1280 kHz.

[7] KLAX's existing site is located at 34-00-24 and 118-21-52; the proposed site at 34-02-45 and 118-21-20.

[8] Specifically, SBSF claims that from the old site it employed prior to its use of its existing, licensed site, the irregular terrain of the Santa Monica Mountains to the north and the Puente Hills and San Jose Hills to the northeast prevented service to portions of its Long Beach coverage area. SBSF contends that a move from its old site to anywhere within the permissible area surrounding the proposed site would alleviate the effects of this terrain shielding and provide "better coverage within the area of [the old] service contour."

Station KIFM(FM)'s listening area due to ducting would be virtually eliminated.[9] Finally, KiFM urges the Commission, should it allot Channel 250B to East Los Angeles, not to grant any later-filed application by SBSF to operate at a different short-spaced site.

5. In its comments, RBI opposes SBSF's proposal, contending that reallotment of Channel 250B to East Los Angeles would exacerbate the existing grandfathered short-spacing and extend Station KLAX-FM's 1.0 mV/m contour further towards that of RBI's West Covina Station KBOB-FM in violation of Section 73.213(a) of the Commission's Rules. RBI also contests SBSF's proposal because it makes no showing that East Los Angeles is in fact a community for allotment purposes.

6. SBSF filed reply comments stating that East Los Angeles has clearly defined boundaries separating it from the city of Los Angeles, and that the essential services of East Los Angeles are provided not by the city of Los Angeles but by Los Angeles County. The community has its own zip codes, as well as businesses and community services that all identify themselves with the East Los Angeles community, and possesses many indicia supporting its contention that it is a distinct, overwhelmingly Hispanic community. SBSF submits exhaustively detailed exhibits that support these assertions, which, in turn, purportedly buttress its claim that East Los Angeles is indeed a community for allotment purposes.[10]

7. SBSF claims that relocation to East Los Angeles would also result in an improved service to listeners of Station KLAX-FM. First, it states that the issue of contour extension towards Station KBOB-FM is prematurely raised at the allotment stage, and that the effects of such extension easily could be alleviated, or even improved, by the use of a directional antenna at the application stage. Second, SBSF claims that shadowing in and around Los Angeles would be significantly reduced by relocation of SBSF's transmitter site. Third, it claims that relocation would greatly reduce the interference due to ducting in Station KIFM(FM)'s San Diego listening area.

8. After the close of the comment period, Antelope filed comments accompanied by a request for acceptance of the late-filed comments, requesting that the reference coordinates specified by SBSF be changed to accommodate Antelope's pending application (File No. BPH-901016IB) to operate its Class A Station KAVS(FM), Mojave, California, as a six kilowatt facility.[11] While Antelope notes that Station KLAX-FM could remain at its existing site and provide city-grade service to East Los Angeles, its engineering exhibit shows that such operation would leave six kilowatt Station KAVS(FM), Channel 249A, short-spaced to Station KLAX-FM. Antelope suggests a specific alternate site for Station KLAX-FM.

9. SBSF opposes acceptance of Antelope's comments on the grounds that the comments are untimely filed. SBSF also rejects the case law cited by Antelope as inapposite to support acceptance of these comments. SBSF argues that such acceptance is contrary to Commission policy in that Antelope's proposed coordinates would not resolve a pre-existing conflict, as Antelope's application was filed after the comment period in this proceeding had closed, that Antelope was not an original party in this proceeding, and that the application represents merely a site preference. Substantively, SBSF claims that use of Antelope's alternate site as reference coordinates would severely limit the site area available to Station KLAX-FM and thereby "eviscerate" the efficiency of SBSF's proposal. It states that Station KAVS(FM) can increase its power to six kilowatts and protect SBSF's proposal by using a directional antenna and by employing the contour protection provisions of Section 73.215 of our Rules. Further, SBSF asserts that Station KAVS(FM) is not automatically entitled to a six kilowatt power increase, and that the Commission recognized that Class A power increases could only be granted selectively. *See Second Report & Order* in MM Docket 88-375, *Amendment of Part 73 of the Rules to provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A FM stations*, 4 FCC Rcd 6375 (1989), *aff'd in relevant part*, 6 FCC Rcd 3417 (1991). In reply, Antelope restates its reliance on the Commission to follow its established procedures to resolve a conflict between an application and proposed rule making reference coordinates.

## DISCUSSION

10. After careful examination of SBSF's proposal and the opposition thereto, we reallot Channel 250B from Long Beach to East Los Angeles. We find that adoption of this proposal would not increase the interference potential to any other station and would result in service to a larger population than would the existing facility. We also find that East Los Angeles is a community for allotment purposes that would receive its first local service. We address each of these issues in turn.

11. *Interference Concerns.* As an initial matter, Station KLAX-FM, Channel 250B, was a grandfathered short-spaced station pursuant to Section 73.213 at the time SBSF filed its petition. The predicted interfering signal contours of Station KLAX-FM overlapped the predicted protected signal contours of second adjacent channel Station KBOB-

[9] Ducting is a phenomenon caused by atmospheric conditions that enhance the propagation of radio signals, most often occurring over or near large bodies of water. KiFM's comments explaining how interference to its station due to ducting would be alleviated are applicable to the existing site for Station KLAX-FM serving Long Beach. The existing site (4.4 km south of the proposed site) is also located farther north and inland at a greater distance from the Pacific Ocean than Station KLAX-FM's old site.

[10] These exhibits include the following: (1) detailed maps showing the boundaries of East Los Angeles as a Census Designated Place, purportedly developed in 1980 by Los Angeles County and the U.S. Census; (2) photographs of libraries, post offices, traffic intersections, businesses, medical facilities, *etc.*, all shown with logos identifying them as East Los Angeles entities; (3) copies of East Los Angeles Chamber of Commerce publications; and (4) written testimonials from community leaders as to East Los Angeles' unique character and its status as a separate community from Los Angeles.

[11] Antelope cited *Bon Air, Chester, Mechanicsville, Ruckersville, Williamsburg and Fort Lee, Virginia*, 7 FCC Rcd 6309 (1992), *Tahlequah, Oklahoma*, 7 FCC Rcd 2552 (1992); *Thomasville, Alabama* 7 FCC Rcd 4463, 4464 (1992), for the proposition that reference coordinates proposed in a rule making may be changed to accommodate an applicant.

FM, Channel 252A, West Covina, and Station KIFM-FM, Channel 251B, San Diego.[12] Adoption of SBSF's proposal, however, with its associated old site relocation, would remove any predicted interference to first adjacent channel Station KIFM(FM) in San Diego. Station KLAX-FM's idealized, non-directional interference contour would no longer overlap Station KIFM(FM)'s idealized, non-directional protected contour.

12. During the pendency of this proceeding, SBSF requested a modification and relocation of the facilities of Station KLAX-FM (File No. BPH-901115IC). Pursuant to Section 73.213(a), any such modification or relocation of a grandfathered short-spaced station requires that its signal contour of 1.0 mV/m field strength not be extended towards the 1.0 mV/m contour of any other short-spaced station. SBSF's request met this requirement, and therefore its application was granted. As a result, Station KLAX-FM now uses a directional antenna with its radiation pattern suppressed to the north.[13]

13. On modification of one or both of the grandfathered short-spaced stations, the question of whether their 1.0 mV/m contours would extend towards each other is most appropriately addressed at the application stage. Where that modification entails a change in the allotment (in this case a change in site or reference coordinates), we ordinarily make a judgment that the ensuing application will be capable of full compliance with that Section. At the allotment stage, we assume that the coverage area for a given class of station is circumscribed by an idealized circular 1.0 mV/m service contour assuming maximum facilities for the class.[14] Accordingly, we determine whether a proposed short-spaced reallotment might ultimately violate this section by considering whether the idealized 1.0 mV/m contour of the proposed allotment would extend towards the estimated actual 1.0 mV/m contour of the affected short-spaced station, using its licensed facilities and the estimated antenna pattern. As a first approximation, however, we consider only whether the distance is reduced between the proposed reference coordinates for the new allotment and the transmitter site of the affected short-spaced station.[15]

14. When we consider whether the 1.0 mV/m contours (the primary service contours) would extend towards each other, we usually do so on the basis of the rules in effect when the rule making was filed. However, when, as here, the station has changed its transmitter site (and other parameters), and the station must be compared with its proposed facilities, we consider its location (and facilities) as they existed at the time of the filing of the petition as irrelevant. We cannot ignore the reality of a proponent's present facilities, particularly when they have changed to a significant extent. Therefore, our assessment of SBSF's proposal will be made in light of its existing facilities.

15. We examined the distances between the existing, relocated site for Station KLAX-FM and the transmitter sites for first adjacent channel Station KIFM(FM)[16] and second adjacent channel Station KBOB-FM. We compared those distances with the corresponding distances between the proposed site for Station KLAX-FM and the sites for the two adjacent channel stations. Upon examination of the proposed site of Station KLAX-FM, we find that it is farther by 2.9 kilometers from Station KIFM(FM) in San Diego, albeit still short-spaced,[17] than Station KLAX-FM's existing site is from the licensed site in San Diego, thereby not raising concerns that the respective 1.0 mV/m contours would extend towards each other. Therefore, the proposed move of Station KLAX-FM would presumptively be in compliance with our Rules, with respect to San Diego Station KIFM(FM). As stated above, because the distance between the proposed site coordinates and the site of an existing station would be increased, the idealized protected 1.0 mV/m contour of the proposed station would be separated by a greater distance and would not extend towards the 1.0 mV/m contour of the existing station in violation of Section 73.213. At the application stage, we would expect

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[12] Applying the +20 dB protection ratio between second adjacent channels (applicable at the time SBSF's petition was filed, but changed as discussed in para. 17 and accompanying note, *infra.*), interference was indicated when Station KLAX-FM's 80 dBu interfering contour overlapped Station KBOB-FM's 60 dBu protected contour. Applying the -6 dB protection ratio for first adjacent channels, interference was indicated by the overlap of Station KLAX-FM's 48 dBu interfering contour with the 54 dBu protected contour of Station KIFM(FM).

[13] Station KLAX-FM was also a grandfathered *super-powered* station at the time SBSF filed its petition. It was licensed to operate at 79 kW (with an antenna height above average terrain ("HAAT") of 125 meters at its old site). Station KLAX-FM is now authorized to operate at the Class B maximum transmitter power of 50 kW with a 119 meter HAAT at its existing site (File No. BLH-911106KA). Its directional antenna pattern, mostly omnidirectional, is suppressed along an azimuth span of roughly $100^0$, *i.e.* extending clockwise from somewhere between $330^0$ and $340^0$ to between $70^0$ and $80^0$.

The suppression appears to avoid the would-be effects of the newly created short-spacing of Station KLAX-FM's existing site to the pending application (File No. BPH-901016IB) of Mojave Station KAVS(FM) to increase its effective radiated power ("ERP") to 6 kW at its licensed site. *See* para. 18, *infra.*

[14] An exception exists for Class C stations, for which we use the actual facilities for the affected station or the minimum Class C facilities (100 kW, 300 meters), whichever is greater.

[15] We recognize that while a decrease in the interstation distance may serve as a basis for rejection of a proposal for reallotment of a grandfathered short-spaced channel, a definitive determination of whether the respective 1.0 mV/m contours would move towards each other cannot be made until the filing of an application for the proposed transmitter site.

[16] Coordinates for Station KLAX-FM at its existing site are 34-00-24 and 118-21-52; for Station KBOB-FM 34-01-22 and 117-56-15; and for Station KIFM(FM) 32-50-17 and 117-14-56.

[17] The distance between Station KLAX-FM, operating on Channel 250B at its existing Long Beach site, and Station KIFM(FM), Channel 251B, is 166.0 km, 3.0 km short of the 169 km required by our Rules between first adjacent Class B commercial stations. However, according to the contour overlap method (which is employed for commercial stations in special situations involving short-spacing), no harmful interference is said to occur since first adjacent Class B channel stations must be separated by only 163.8 km to avoid overlap of the interference contour of one station with another station's protected contour. Accordingly, Station KIFM(FM) is predicted not to suffer harmful interference from Station KLAX-FM operating at maximum facilities because its idealized interference contour does not overlap and falls short of the idealized protected contour of Station KIFM(FM) operating at maximum facilities by 2.2 km (166.0 km-163.8 km). This also demonstrates the degree of overprotection that sometimes exists for certain channel relationships relative to our required distance separations, in this case a minimum of 5.2 km (169 km-163.8 km) overprotection of Station KIFM(FM).

that the actual 1.0 mV/m contour of Station KLAX-FM as licensed and that of Station KIFM(FM) would be separated from each other by a distance greater than that prior to the site relocation. Of course, if at the application stage, the distance is less than the separation existing prior to the site change, the requested authorization to operate on the new allotment would be violative of Section 73.113(a) and denied.

16. By contrast, however, the distance between the proposed transmitter site of Station KLAX-FM and Station KBOB-FM is less by eight tenths of a kilometer than the distance between Station KLAX-FM's existing site and Station KBOB-FM.[18] Therefore, we would presume that the estimated actual 1.0 mV/m contour (determined at the application stage) of Station KLAX-FM would extend towards the actual 1.0 mV/m contour of second adjacent channel Station KBOB-FM.[19] Presumptively, this would mean that the actual primary service contours of the two stations would move towards each other, thereby strictly violating Section 73.213(a) with respect to Station KBOB-FM. It should be recognized that a site change resulting in shortening the distance between these contours would normally mean that the interference potential between grandfathered short-spaced stations would be exacerbated. However, the definition of what constitutes harmful interference for second adjacent channels has changed.

17. Since the filing of the petition for rule making in this docket, the Commission has since reduced and made less restrictive the protection afforded second adjacent channel stations. *See Memorandum Opinion and Order* in MM Docket No. 87-121, *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Assignments by Using Directional Antennas*, 6 FCC Rcd 5356 (1991). In order to make the contour protection rules for commercial stations consistent with the spacing requirements to which all such stations must adhere, wherein the spacings for second and third adjacent channels are identical, the Commission made the protection ratio for second and third adjacent channels also identical. The protection ratio for second adjacent channels prior to the rule change was the more restrictive +20 dB and for third adjacent channels +40 dB; it is now +40 dB for both. As a result of this change, the interference potential, as newly defined, between second adjacent channel stations such as Station KALX-FM and Station KBOB-FM has been greatly reduced to the point that we do not recognize it as harmful interference.[20] With the change in definition using a +40 dB protection ratio, the respective protected and interfering contours of Stations KALX-FM (at the old, existing, or proposed sites) and KBOB-FM fail to overlap by five kilometers, more or less, for these two second adjacent stations. Accordingly, despite the presumed movement of the 1.0 mV/m contours towards each other by 0.8 kilometer, the interference potential (as newly defined) between the two stations would almost assuredly be less than it had been before the Rule change. The purpose of the rule prohibiting the movement of the primary service contours approaching each other has been to guard against any resulting harmful interference. In this case, however, a reduction in the distance between sites of less than a kilometer would not likely result in actual increased harmful interference. Furthermore, whatever tiny increase there might be in the potential for interference, we do not recognize it as harmful interference. We do not consider the move of Station KALX-FM's site toward that of KBOB-FM to be violative of the underlying purpose of Section 73.213(a). Therefore, we will not regard such movement as barring the SBSF's proposed site relocation of Station KALX-FM.

18. On the other hand, Antelope's request made in its late-filed comments must be denied.[21] Were we to change the reference coordinates as proposed by Antelope from those for Station KLAX-FM's existing site (serving Long Beach), in order to accommodate the six kilowatt application for first adjacent channel Station KAVS(FM), Section 73.213(a) would likely be violated. Such a change would

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[18] SBSF's existing site at Long Beach is located 39.5 km (24.5 miles) from Station KBOB-FM, West Covina. SBSF's proposed site for Station KLAX-FM at East Los Angeles is closer to Station KBOB-FM, located only 38.7 km (24.1 miles) away. We note that the distance between the proposed East Los Angeles site and Station KBOB-FM is 6 km more than that between the old Long Beach site and that station.

[19] We recognize that the applicant may directionalize its signal by suppressing the radiation pattern along the azimuth to another station or by a transmitter power reduction. Were none of these steps taken, Station KLAX-FM theoretically would pose a greater interference potential to the second adjacent channel Station KBOB-FM than from its existing site, albeit to a minor extent.

[20] The change to +40 dB (from the more restrictive +20 dB that now only applies to educational stations) represents a relaxation of the interference standards that applied to commercial second adjacent channels. A +40 dB protection ratio requires the interfering signal strength (its power) to be 10,000 times greater than that of the desired signal before harmful interference is said to exist, whereas +20 dB requires that the interfering signal be only 100 times greater before harmful interference is declared. For example, what was once regarded as an area in which harmful interference would occur using a +20 dB protection ratio, would in many cases not be regarded as an interference area because of its markedly reduced size due to use of +40 dB. Therefore, the potential is greatly reduced that an overlap of the interfering contours with the protected contours will occur, thereby greatly reducing the potential for interference.

For it to be assumed that Station KLAX-FM interferes with Station KBOB-FM, the 100 dBu interfering contour of Station KLAX-FM would have to overlap the 60 dBu protected contour of KBOB-FM, *i.e.* the ratio between the undesired and desired signal levels inside that overlap exceeded 40 dB. In fact, there is no such overlap and we deem that Station KLAX-FM causes no harmful interference to Station KBOB-FM. Before the recent rule change, a protection ratio of only +20 dB had to be exceeded before harmful interference could be declared. That is, Station KLAX-FM's 80 dBu interfering contour had to overlap Station KBOB-FM's 60 dBu protected contour, and it did. Thus, a more restrictive +20 dB protection ratio resulted in a finding, *no longer applicable*, that Station KLAX-FM caused harmful interference to Station KBOB-FM.

[21] We accept Antelope's late-filed comments for consideration, recognizing that they were filed well beyond the deadline for doing so. We believe that the public interest demands consideration of proposals that could result in effectuating Commission goals in the maximization of the number of 6 kW Class A stations. Moreover, even though an applied-for transmitter site generally reflects a site preference and is not favored over a new allotment, the Commission will strive to accommodate all parties if other sites appear to be available. *See Greenville, Texas*, 6 FCC Rcd 6048 (1991).

exacerbate the short-spacing between Station KLAX-FM and Station KIFM(FM), San Diego. Operation at Antelope's proposed site would reduce the distance from Station KLAX-FM to Station KIFM(FM) by 8.2 kilometers, presumably causing the primary service contour of Station KLAX-FM, as operated on the proposed East Los Angeles allotment, to extend towards the contour of Station KIFM(FM). We decline to adopt Antelope's proposal to change the reference coordinates for Station KLAX-FM for this reason.[22] Wenote, however, that it may be unnecessary to change coordinates if Station KAVS(FM) could operate despite the short-spacing, particularly in light of the suppressed radiation pattern of Station KLAX-FM discussed in footnote 12, *supra*.[23]

19. *Community Status*. We note that East Los Angeles is a Census Designated Place with a population of 126,379 according to the 1990 U.S. Census. The Commission has generally presumed that an area is a community for allotment purposes when it is so designated. *See e.g. Hollywood and California, Maryland and King George, Virginia*, 3 FCC Rcd 4043 (1988). Moreover, East Los Angeles possesses many of the requisite indicia we have long recognized as characteristic of a community for allotment purposes. For example, East Los Angeles has several hospitals, colleges, and two weekly bi-lingual newspapers and numerous businesses, several post offices, which reflect the Spanish-speaking majority of its residents. *See* paragraphs 2 and 6, *supra*. We, therefore, regard East Los Angeles as a community for allotment purposes.

20. *Change of Community of License*. East Los Angeles lies within the Los Angeles Urbanized Area as does Long Beach. Therefore, in reallotting an FM channel from one Los Angeles community to another within this same urbanized area, no issue exists as to whether there is an attempt by the petitioner to move into an urbanized area. However, in examining the merits of reallotting a channel within the same urbanized area, we must determine whether the proposal would result in a preferential arrangement of allotments. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (*"Community of License MO&O"*) In determining whether a proposed reallotment represents a preferential arrangement of channels, we apply the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).[24] Under priority 3), East Los Angeles would be favored as a first local service over Long Beach, which will continue to receive four local aural transmission services. Furthermore, the proposed reallotment of Channel 250B from Long Beach to East Los Angeles would result in a net service gain of 452 square kilometers with a population of 298,072 persons.[25] [26]

21. In reaching this result, we recognize that we have not applied *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), and want to clarify our reasons for not doing so. In the *Community of License MO&O*, the Commission was concerned about a mechanical application of the FM priority for first local service that "would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies." *Id.* at 7096, para. 14. To avoid such results, the Commission indicated that it would apply *Huntington* and *Faye and Richard Tuck* under which suburban communities seeking a first local service preference would be attributed with the radio or television stations of a nearby, large city unless it were demonstrated that the suburban community was sufficiently independent of the large city to warrant a first local service preference. Consistent with this policy, we have applied *Huntington* and *Faye and Richard Tuck* in cases involving moves from communities outside of urbanized areas to communities inside of urbanized area, as defined by the U.S. Census,[27] because we were concerned that a first local service preference was being used as a mechanism for a station to enter a large market. However, those concerns do not exist in cases such as the instant one where a station is already licensed to a community in an urbanized area and seeks to

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[22] The path length between the existing transmitter site of Station KLAX-FM and Station KIFM(FM)'s site is 166.0 km, a 3.0 km short-spacing. That path would be further reduced to 157.8 km if the reference coordinates proposed by Antelope were used. Moreover, if Station KLAX-FM were operated from this proposed site, the station would cause harmful interference in the San Diego listening area of Station KIFM(FM). Channels 250B and 251B, as first adjacent channels, have a protection ratio of -6 dB, which has remained the same since the petition was filed. Using -6 dB, our analysis reveals an area where existing service would be disrupted by harmful interference, an area of 4.4 square km containing approximately 1009 persons.

However, the operation of Station KLAX-FM from Antelope's proposed site would not likely cause harmful interference to second adjacent channel Station KBOB-FM, despite an intersite distance reduction to 32.8 km (from 39.5 km, representing a 29.5 km short-spacing). Because of the change in the protection ratio from +20 dB to +40 for second adjacent channels (*See* para. 17 and accompanying note, *infra*.), the interference contour of Station KLAX-FM operated at Antelope's proposed reference coordinates would not overlap the protected contour of Station KBOB-FM.

[23] If it can be shown that Station KAVS(FM) could be operated without causing or being subjected to harmful interference, presumably, this would facilitate Antelope's reaching mutual agreement with Station KLAX-FM to permit Station KAVS(FM) to increase its ERP to 6 kW. Antelope has already reached a mutual agreement with another short-spaced Station KKBB(FM), Channel 249A, Shafter, California, which has a pending application (File No. 910409IC) to permit Station KKBB(FM) to operate at 6 kW.

[24] The FM allotment priorities are: 1) first aural service, 2) second aural service, 3) first local service, and 4) other public interest matters.

[25] A new East Los Angeles allotment would provide additional reception service in an area of 485 $km^2$ (187.3 $mi^2$) with an estimated 336,580 persons, and would result in a loss of reception in an area of 33 $km^2$ (12.7 $mi^2$) containing 38,508 persons. (485-33 = 452 and 336,580-38,508 = 298,072)

[26] SBSF, however, stated in its consolidated reply comments that it intends to directionalize the signal of Station KLAX-FM. We note that it has already done so, presumably to better serve its existing community of license, Long Beach. *See* para. 12 and accompanying note, *supra*. Operation of Station KLAX-FM with a directionalized signal would alter the East Los Angeles coverage area from the idealized coverage area of its allotment (as Long Beach's idealized coverage has been altered) as would relocation of its transmitter site within the permissible site area or operation with less than maximum facilities.

[27] *See e.g., Elizabeth City, NC*, 9 FCC Rcd 3586 (Allocations Branch 1994).

change its community of license to another community in the same urbanized area. In such cases, a first local service preference is not being used as a basis to enter the market.

22. *Technical Summary*. Channel 250B can be allotted at East Los Angeles in compliance with the Commission's minimum distance separations requirements at a site restricted to 18.9 kilometers (11.7 miles) east of the reference coordinates for East Los Angeles, at North Latitude 34-02-45 and West Longitude 118-21-20.

23. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 1, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

| Community | Channel No. |
|---|---|
| East Los Angeles, California | 250B |
| Long Beach, California | 288A |

24. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Spanish Broadcasting Systems of Florida, Inc. for Station KLAX-FM, Channel 250B, Long Beach, California, IS MODIFIED to specify operation on Channel 250B at East Los Angeles, California as its new community of license, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license for Station KLAX-FM, except the community as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for modification of construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-911106KA, except for the community as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests. Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

25. IT IS FURTHER ORDERED, That the counterproposal (RM-7367) filed by Richard A. Cramer that Channel 251A be allotted to Frazier Park, California IS DISMISSED.

26. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

27. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-522**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7493 |
| Table of Allotments, | RM-7499 |
| FM Broadcast Stations. | |
| (Douglas, Georgia and | |
| LaCrosse, Florida) | |

**MEMORANDUM OPINION AND ORDER**
**AND**
**ORDER REOPENING FILING WINDOW**
**(Proceeding Terminated)**

**Adopted: March 9, 1995; Released: March 17, 1995**

By the Chief, Policy and Rules Division:

1. The Commission on its own motion reconsiders its decision of the *Report and Order*, in this proceeding, 8 FCC Rcd 736 (1993). The *Report and Order* substituted Channel 258C for Channel 258C1 at Douglas, Georgia, and modified the license of Station WDMG(FM) to specify operation on Channel 258C. In addition, Channel 258A was allotted to LaCrosse, Florida, as a first local aural transmission service.

2. *Background.* This proceeding began with the filing of two separate and mutually exclusive petitions for rule making. The first petition, filed by WDMG, Inc., ("WDMG"), proposing the substitution of Channel 258C for Channel 258C1 at Douglas, Georgia,[1] and the modification of Station WDMG(FM)'s license to specify operation on the higher class channel. The second petition, filed by Robert E. Wideman ("Wideman"), requested the allotment of Channel 258A to LaCrosse, Florida, as that community's first local aural transmission service. In response to the petitions for rule making the Commission issued a *Notice of Proposed Rule Making*, 5 FCC Rcd 6575 (1990).

3. In the *Report and Order*, we concluded that with appropriate site restrictions, both channels could be allotted. Subsequent to the release of the *Report and Order*, we discovered that this engineering conclusion was incorrect and the proposals remained mutually exclusive. Therefore, it is necessary to reconsider the *Report and Order*. With respect to the filing window for the allotment of Channel 258A to LaCrosse, Florida, we issued an *Order Staying Filing Window*, 8 FCC Rcd 2146 (1993), to allow for further consideration of the two proposals.

4. A further engineering analysis determined that there are no alternate channels or sites available for Douglas, Georgia and LaCrosse, Florida, which would remove the mutual exclusivity. Therefore, we must comparatively consider these proposals under the Commission's *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) under priority (3).[2] A first local aural FM transmission service is generally preferred over a proposal to upgrade an existing facility. *See also, Benton, Arkansas*, 3 FCC Rcd 4840 (1988), *recon. denied*, 7 FCC Rcd 2555 (1992). If the proponent for a channel upgrade is in conflict with a proposal for a new allotment, the upgrade proponent may demonstrate that its proposal should be preferred by providing a showing of need for the proposed increase in existing service. This could take the form of a comparison indicating which new areas are to be covered and the extent to which these areas are currently unserved or underserved. In the absence of such a showing of need for the proposed increase in service, a conflicting new allotment would be favored since it represents a new service. *See Benton, Arkansas, supra.* WDMG has not made such a showing. Therefore, we find that the provision of a first local aural service at LaCrosse, Florida, must be preferred over the proposal to upgrade the existing service to Station WDMG(FM), Douglas, Georgia.

5. In consideration of the above, we believe the public interest would be served by the allotment of Channel 258A to LaCrosse, Florida. Channel 258A can be allotted to LaCrosse in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.2 miles) southeast,[3] in order to avoid a short-spacing to Station WDMG(FM), Channel 258C1, Douglas, Georgia, and Station WQIK(FM), Channel 256C, Jacksonville, Florida. Therefore, it is no longer necessary to stay the filing window for Channel 258A at LaCrosse, Florida. We will deny the proposed Douglas upgrade on Channel 258C, and reopen the filing window for Channel 258A at LaCrosse, Florida.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 1, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| LaCrosse, Florida | 258A |
| Douglas, Georgia | 258C1 |

7. Accordingly, IT IS ORDERED, That the window period for filing applications for Channel 258A at LaCrosse, Florida, will open on **May 1, 1995**, and close on **June 1, 1995**.

8. IT IS FURTHER ORDERED, That the petition for rule making filed by WDMG Inc., (RM-7493), requesting the substitution of Channel 258C for Channel 258C1 at Douglas, Georgia, IS DENIED.

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[1] An application for the assignment of the license for Station WDMG(FM), Douglas, Georgia, from WDMG Inc. to Bruce B. Timm and Jan B. Timm was granted November 4, 1993 (BALH-931013GM).

[2] The allotment priorities are (1) First fulltime aural service; (2) Second fulltime aural services; (3) First local aural service; (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)].]

[3] The coordinates for Channel 258A at LaCrosse are North Latitude 29-44-38 and West Longitude 82-19-52.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH
COMPANY,
Complainant,

v.

MCI TELECOMMUNICATIONS CORPORATION, Defendant, — File No. E-92-88

and

MCI
TELECOMMUNICATIONS
CORPORATION,
Complainant,

v.

AT&T CORPORATION, Defendant. — File No. E-94-80

**ORDER**

**Adopted: March 9, 1995; Released: March 17, 1995**

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. AT&T Corporation (AT&T) (formerly American Telephone and Telegraph Company) filed a complaint, File No. E-92-88, against MCI Telecommunications Corporation (MCI) alleging that MCI had violated the Commission's international settlements policy (ISP) in its provision of service to the United Arab Emirates. The Common Carrier Bureau (Bureau) found that MCI had violated the ISP.[1] AT&T then filed a supplemental complaint for damages stemming from MCI's violation while MCI responded by filing an application for review of the Bureau's order. In a separate matter, on August 18, 1994, MCI filed a complaint, File No. E-94-80, alleging that AT&T had violated the ISP with respect to the provision of certain services with Bolivia. No order has yet been issued in this proceeding and the parties have been addressing interrogatories.

2. At present, the parties have filed motions seeking dismissal, with prejudice, of AT&T's supplemental complaint for damages and MCI's application for review of the Bureau's order in File No. E-92-88, as well as a joint motion to dismiss MCI's complaint against AT&T's alleged violation of the ISP in conjunction with service to Bolivia.[2] In support of their motions, the parties state that a mutually agreeable settlement of all of the claims in these actions has been reached.

3. We are satisfied that granting the parties' motions will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss and MCI's Motion for Voluntary Dismissal ARE GRANTED.

5. IT IS FURTHER ORDERED that the supplemental complaint; the application for review; and the complaint in the above-captioned proceedings ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[1] American Telephone and Telegraph Company v. MCI Telecommunications Corporation, 9 FCC Rcd 2688 (Com. Car. Bur. 1994).

[2] MCI filed a motion for voluntary dismissal of its application for review on March 1, 1995. On that same date, the parties filed a joint motion to dismiss AT&T's supplemental complaint for damages in File No. E-92-88 and MCI's complaint in File No. E-94-80.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-299**

In the Matter of

CAVAN COMMUNICATIONS

License of Station WTMS (AM)
Presque Isle, Maine

Order to Show Cause Why the
License for Station WTMS (AM),
Presque Isle, Maine Should
Not Be Revoked.

**APPEARANCES**

*J. Dominic Monahan, Esq.* on Cavan Communications Corporation; and *Gary P. Schonman, Esq.* on behalf of the Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON**

**Issued: March 10, 1995; Released: March 17, 1995**

## I. PRELIMINARY STATEMENT

1. By *Order to Show Cause and Hearing Designation Order*, 8 FCC Rcd 8414 (MMB 1993) (*"Show Cause Order"*), the Chief, Audio Services Division, Mass Media Bureau, ordered Cavan Communications Corporation ("Cavan") to show cause why its license for Station WTMS(AM),[1] Presque Isle, Maine, should not be revoked upon the following issues:

(a) To determine whether Cavan Communications Corporation has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules.

(b) To determine whether Cavan Communications Corporation has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Cavan Communications Corporation is qualified to be and remain the licensee of Station WTMS(AM).

2. The *Show Cause Order* placed the burden of proceeding with the introduction of the evidence and the burden of proof with respect to the designated issues upon the Mass Media Bureau. The *Show Cause Order* also directed that, if it is determined that revocation of the WTMS(AM) license is not warranted, the Presiding Judge shall determine, pursuant to §503(b) of the Communications Act of 1934, as amended, whether to issue an Order of Forfeiture against Cavan in an amount not to exceed $250,000 for the willful and/or repeated violation of §73.1740 and/or §73.1750 of the Commission's Rules.

3. A hearing in this proceeding was held in Washington, D.C., on March 24, 1994, after which the record was closed. *See Order*, FCC 94M-198 (released March 28, 1994).

## II. FINDINGS OF FACT

4. Cavan purchased WTMS(AM) and co-located sister station WTMS-FM (also licensed to serve Presque Isle, Maine) On November 1, 1987. Initially, the AM and FM stations were programmed separately, and WTMS(AM) employed its own live on-air staff. From the outset, revenues from the operation of WTMS(AM) fell short of Cavan's expectations. In an effort to trim expenses, Cavan commenced simulcasting the two stations in the fall of 1989. Nevertheless, the cash-flow from the combined operation of the two stations remained disappointing. (Cavan Ex. 1, p. 1).

5. On or about March 29, 1991, the main transmitter tube for WTMS(AM) failed, and the station went off the air. Cavan determined that it could not afford the expense of replacing the $2,000 tube, and the station remained silent. (Cavan Ex. 1, p. 1).

6. About two months later, by letter dated May 17, 1991, Cavan filed with the Commission its first request for authority for WTMS(AM) to stay off the air. (MMB Ex. 1) The letter was signed by Cavan's President, J. Dominic Monahan ("Monahan"), who is, and was at the time, an experienced communications attorney. (Tr. 50-51). As was his practice, Monahan obtained a date-stamped copy of the submission demonstrating that it has been properly filed with the Office of the Secretary of the Commission. (Tr. 52). The letter does not state exactly when the station first went off the air. (MM Ex. 1). The Commission acted on Cavan's request within a matter of days. By letter dated May 23, 1991, the Commission granted Cavan temporary authority for WTMS(AM) to remain silent. The letter provided that WTMS(AM) could stay off the air through August 23, 1991. (MM Ex. 2; Tr. 59-60).

7. After WTMS(AM) first went dark, Cavan intended to restructure its financing so that the company could make necessary repairs and place the station back on the air. Shortly, however, in the summer or fall of 1991, Cavan abandoned plans to operate WTMS(AM)and decided instead to direct its efforts toward selling the station (Cavan Ex. 1, p.2; Tr. 57-59).

8. On August 23, 1991, Cavan's authority for WTMS(AM) to remain silent expired. Cavan did not file a request for further silent authority by that date. Approximately six months later, by letter dated February 28, 1992,

[1] At that time Station WTMS(AM) operated under the call sign WEGP(AM). This call sign was changed to WTMS(AM) in 1989. On March 3, 1994 Cavan requested and was granted application to return the call sign to its original call letters, WEGP(AM). (Cavan Ex 1, Attachments L and O, Tr. 86, 87). Herein, the station will be referred to as Station WTMS(AM).

the Commission advised Cavan that WTMS(AM) was off the air without authority. The Commission's letter of inquiry required Cavan to submit a written response within 30 days informing the Commission of the status of WTMS(AM). (MM Ex. 3; Tr. 60-61).

9. By letter dated March 11, 1992, Cavan submitted its response to the Commission's letter of inquiry. In its response, Cavan made its second request for authority to keep WTMS(AM) silent. The letter was signed by Monahan, who, consistent with his practice, obtained a date-stamped copy of the correspondence demonstrating that it had been properly filed with the Office of the Secretary of the Commission. (MM Ex. 4; Tr. 61). The Commission acted on Cavan request within a month. By letter dated April 10, 1992, the staff granted Cavan authority to keep WTMS(AM) silent through July 10, 1992. (MM Ex. 5; Tr. 61-62).

10. By letter dated July 10, 1992, Cavan filed its third request for authority for WTMS(AM) to remain silent. Monahan authorized the filing of the letter, and consistent with his practice, obtained a date-stamped copy demonstrating that the correspondence had been properly filed with the Office of the Secretary of the Commission. (MM Ex. 6; Tr. 63-64).

11. Less than two weeks later, the Commission responded to Cavan's request. A letter to Monahan dated July 23, 1992, stated that the Commission was deferring action on Cavan's request for further silent authority pending receipt of an executed Anti-Drug Abuse Act certification. (MM Ex. 7; Tr. 64). Nearly a month later, Cavan filed an executed Anti-Drug Abuse Act certification. Consistent with his practice, Monahan obtained a date-stamped copy of the certification and accompanying transmittal letter, dated August 20, 1992, demonstrating that the correspondence had been properly filed with the Office of the Secretary of the Commission. (MM Ex. 8; Tr. 64-65). In response to a subsequent informal request by the Commission staff, Cavan tendered a copy of the same certification on October 23, 1992. Consistent with his practice, Monahan obtained a date-stamped copy of the October 23, 1992, submission, demonstrating that it had been properly filed with the Office of the Secretary of the Commission. (MM Ex. 9; Tr. 66). One week later, on October 30, 1992, the Commission granted Cavan further authority for WTMS(AM) to remain silent. The station's silent authority extended to January 30, 1993. (MM Ex. 10; Tr. 67).

12. On January 30, 1993, Cavan's authority for WTMS(AM) to remain silent expired. Cavan did not submit a request for further silent authority by that date. Three weeks later, by letter dated February 18, 1993, the Commission advised Cavan that WTMS(AM) was off the air without authority. The Commission's letter required Cavan to submit a written response within 30 days informing the Commission of the status of WTMS(AM). (MM Ex. 11).

13. Cavan did not respond to the Commission letter of inquiry within 30 days. However, on March 22, 1993, Cavan filed its fourth request for authority to keep WTMS(AM) silent. As was his practice, Monahan obtained a date-stamped copy of the correspondence demonstrating that it had been filed with the Office of the Secretary of the Commission. (MM Ex. 12; Tr. 69) Approximately one week later, by letter dated March 30, 1993, the Commission granted Cavan request for authority for WTMS(AM) to remain silent. Cavan was authorized to keep WTMS(AM) dark through June 30, 1993. (MM Ex. 13; Tr. 69).

14. On June 30, 1993, Cavan's authority to keep WTMS(AM) silent expired. Cavan did not request further silent authority by that date. Nearly one month later, by letter to Monahan dated July 26, 1993, the Commission informed Cavan that WTMS(AM) was off the air without authority. The Commission's letter required Cavan to file a written response within 30 days informing the Commission of the status of WTMS(AM). (MM Ex. 14; Tr. 70).

15. Commission records do not reveal that Cavan filed a response to the July 26, 1993, letter of inquiry. Although Monahan claims that he transmitted to the Commission a fifth request for silent authority on August 26, 1993, Monahan did not obtain (and consequently Cavan was unable to produce at hearing) a date-stamped copy of any such filing with the Commission. (Cavan Ex. 1, Attachment J; Tr. 71). Furthermore, the Commission never acknowledged receiving a further request for silent authority from Cavan; no further authority was ever granted, and, despite the passage of several months without any action, at no time subsequent to August 26, 1993 did Monahan inquire of the Commission's staff about the status of Cavan's purported request. (Tr. 64-75). Monahan learned that the Commission had commenced this proceeding to revoke Cavan's license for WTMS(AM) shortly after the *Show Cause Order* was released on November 30, 1993. (Tr. 75).

16. Upon release of the *Show Cause Order*, Cavan made the decision to take all actions necessary to return WTMS(AM) to the air as soon as possible. Repairs were made at a cost of approximately $13,000. (Tr. 88). Within four months, on March 18, 1994, WTMS(AM) commenced broadcasting pursuant to Special Temporary Authority. (MM Exs. 16 and 17; Tr. 81). On March 22, 1994, Cavan filed its required application on FCC Form 302.[2] (MM Ex. 18; Tr. 85).

17. On March 23, 1994, Cavan entered into a Local Marketing Agreement ("LMA") with Lobster Radio Network, Inc. ("Lobster"). The LMA permits Lobster to operate WTMS(AM) on behalf of Cavan until such time as: (a) either party terminates the contract upon 90-days written notice to the other; (b) both parties terminate the contract by mutual written agreement; (c) Lobster purchases the station from Cavan; or (d) the contract is determined to be illegal or in violation of the Commission's Rules or the Communications Act of 1934, as amended. (Cavan Ex. 1, Attachment K).

18. Although WTMS(AM) has a main studio with program origination capability, the station is presently broadcasting programming which is produced in, and delivered by satellite from, Florida by a company called International Broadcast Network ("IBN"). IBN provided its programming to WTMS(AM) pursuant to a written contract with Lobster. Monahan has never seen, and is unfamiliar with, the terms of IBN's contract with Lobster. Furthermore, Monahan is unaware of how long WTMS(AM) will continue to broadcast IBN programming. (Tr. 91-94).

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[2] The Commission requires AM stations which are silent for more than six months to file an FCC Form 302 prior to returning to the air.

19. Cavan does not have a written operating budget for WTMS(AM). Tr. 97-98). Nor does Cavan have any contingency plans for operating the station in the event the LMA with Lobster is terminated. If, for any reason, the LMA is terminated, Cavan would be unable financially to operate the station without an immediate infusion of money from Cavan shareholders. (Tr. 103-104).

20. Cavan has experienced severe financial hardship since it acquired WTMS(AM) and WTMS-FM in 1987; the company reported a net income of $5,553 in the year ending December 31, 1993. The company has not prepared any projected financial statements for the 1994 fiscal year. (Cavan Ex. 1, Attachment N; Tr. 107).

## III. CONCLUSIONS OF LAW

### A. Section 73.1740 Issue

**Section 73,1740(a)(4) of the Commission's Rules provides:**

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C., not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

21. Cavan has violated §73.1740 of the Commission's Rules on several occasions since 1991. Station WTMS(AM) initially went off the air on or about March 29, 1991. However, it was not until May 17, 1991 – nearly two months later – that Cavan sought authority from the Commission to keep WTMS(AM) silent. Since Cavan was required by §73.1740 to submit its request for silent authority within 30 days of the date on which the station first went silent, and Cavan waited nearly twice that long to do so, it is concluded that Cavan violated § 73.1740 of the Commission's Rules in May 1991 by failing to seek in a timely manner Commission authority for WTMS(AM) to remain silent.

22. Cavan violated § 73.1740 a second time during the period from August 1991 to April 1992. The evidence is that on May 23, 1991, the Commission granted Cavan's initial request for authority to keep WTMS(AM) off the air, and that such authority expired on August 23, 1991. Cavan, however, did not request further silent authority until March 11, 1992, and the Commission did not grant such further authority until April 10, 1992. Since WTMS(AM) was off the air without Commission authority during the entire period from August 23, 1991, through April 10, 1992, and §73.1740 required Cavan to obtain Commission authority to keep WTMS(AM) silent during that period, it is concluded that Cavan violated §73.1740 for approximately eight continuous months by keeping WTMS(AM) silent without authority.

23. Cavan violated § 73.1740 a third time during the months of February and March 1993. The evidence shows that on October 30, 1992, the Commission granted Cavan further authority to keep WTMS(AM) silent through January 30, 1993. However, Cavan did not request any additional authority for WTMS(AM) to remain silent until March 22, 1993. Moreover, the Commission did not grant Cavan's request for additional time to keep WTMS(AM) off the air until March 30, 1993. Since WTMS(AM) was off the air without Commission authority from January 30, 1993, until March 30, 1993, and §73.1740 required Cavan to obtain Commission authority in order to keep WTMS(AM) silent during that period, it is concluded that Cavan violated §73.1740 again, this time for two continuous months during which time the station was silent without authority.

24. Cavan's fourth and most recent violation of §73.1740 occurred between June 1993 and March 1994. The record evidence reveals that on March 30, 1993, the Commission granted Cavan further authority to keep WTMS(AM) silent through June 30, 1993. After that authority expired, however, Cavan failed to request any additional authority for WTMS(AM) to remain silent. The station returned to the air on March 18, 1994. Since WTMS(AM) was off the air without Commission authority from June 30, 1993, until the station returned to the air on March 19, 1994, and §73.17 40 required Cavan to obtain Commission authority in order to keep WTMS(AM) silent during that period, it is concluded that Cavan violated §73.1740 yet again, this time for nine continuous months during which the station was silent without Commission authorization.

25. Evidence concerning all of Cavan violations of §73.1740 is relevant despite the fact that the *Show Cause Order* makes specific reference only to Cavan's most recent transgression of that rule section. *Show Cause Order*, at ¶ 2-3. "It is well established that evidence relevant to the designated issues should not be excluded 'merely because it was not included among the specific instances which warranted the hearing.'" *Clay Frank Huntington*, 61 FCC 2d 123, 124 (Rev. Bd. 1976), *citing*, *Chronicle Broadcasting Co.*, 20 FCC 2d 33, 39 (1969); *Belk Broadcasting Co. of Florida, Inc.*, 27 FCC 2d 921 (Rev. Bd. 1971); *WPIX, Inc.*, 25 FCC 2d 678 (Rev. Bd. 1970). Moreover, the *Show Cause Order* specifically contemplated that evidence of Cavan's other, prior violations of §73.1740 should be considered. The *Show Cause Order*, at ¶ 7, directed the Presiding Judge to determine whether to issue an Order of Forfeiture against Cavan for its willful and/or "repeated" violation of §73.1740. It would render the reference to "repeated" superfluous if the only evidence that could be considered was evidence involving Cavan's single most recent violation of §73.1740. Furthermore, evidence of Cavan's multiple violations of §73.1740 is relevant to determining the extent of any forfeiture directed against Cavan.

### B. Section 73.1750 Issue

**Section 73.1750 of the Commission's Rules provides:**

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is dis-

continued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

26. The issue as to whether Cavan violated §73.1750 is resolved in Cavan's favor. Although the station was off the air for some two years, the evidence plainly reveals that WTMS(AM) has commenced broadcasting again. Indeed, Cavan obtained Special Temporary Authority to return WTMS(AM) to the air, and the licensee has filed an application on FCC Form 302, as required by the Commission. The question as to whether Cavan permanently discontinued operating WTMS(AM) is adequately answered by the fact that Cavan has taken all necessary steps to make the station operational again.

### C. Resumption of Operation Issue

27. Cavan does have the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules. Cavan has managed to return WTMS(AM) to the air on what appears to be a long-term basis. Cavan obtained Special Temporary Authority prior to commencing broadcast operations, and it has filed an application on FCC Form 302. Furthermore, Cavan has entered into a Local Marketing Agreement with a company that itself has contracted for the broadcast of syndicated programming. Based on the foregoing, the issue as to whether Cavan has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) will be resolved in Cavan favor.

## IV. ULTIMATE CONCLUSIONS

28. The ultimate question to be decided in this proceeding is whether, on the basis of the evidence adduced at hearing, Cavan's license to operate WTMS(AM) should be revoked. It is concluded that Cavan has the capability and intent to expeditiously resume broadcast operations of WTMS(AM) consistent with the Commission's Rules. Furthermore, it is concluded that Cavan has not violated §73.1750 of the Commission's Rules. However, the facts plainly demonstrate that Cavan has repeatedly violated §73.1740 of the Commission's Rules. Nevertheless, license revocation is not warranted for these transgressions.

29. The *Show Cause Order*, at ¶ 7, directed that, if it is determined that revocation of the WTMS(AM) license is not warranted, the Presiding Judge shall determine, pursuant to §503(b) of the Communications Act of 1934, as amended, whether to issue an Order of Forfeiture against Cavan in an amount not to exceed $250,000 for the willful and/or repeated violation of §73.1740 and/or §73.1740 of the Commission's Rules.

30. Cavan has repeatedly violated §73.1740 of the Commission's Rules, and the violations are wholly inexcusable. However, given Cavan's difficult financial condition, the imposition of a substantial forfeiture could have a decidedly negative impact on the ability of the company to continue operating both its AM and FM stations in Presque Isle, Maine. It is concluded that the public interest will be served by the imposition of a forfeiture in the amount of $1,000.00.

31. Accordingly, IT IS ORDERED THAT Cavan Communications Corporation forfeit to the United States the sum of $1,000.00 for its repeated violations of Section 73.1740 of the Commission's Rules.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

[3] In the event exceptions are not filed within (3) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-31**

In the Matter of

Reexamination of the Comparative Standards for New Noncommercial Educational Applicants

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: February 28, 1995; Released: March 17, 1995**

**Comment Date: April 24, 1995**
**Reply Date: May 10, 1995**

By the Commission:

## I. INTRODUCTION

1. In this *Notice*, we invite additional comments relating to possible modification of the criteria currently used to select among competing applicants for new noncommercial educational ("NCE") broadcast facilities.[1] Comments received in GC Docket No. 92-52 concerning NCE comparative criteria will be consolidated with comments received in this proceeding and modification of the NCE comparative criteria will be considered in the context of this proceeding, not in the context of GC Docket No. 92-52. We are sensitive to the need to resolve the questions addressed in this proceeding as quickly as possible. We have therefore established a short comment and reply comment period and will act expeditiously once the pleading cycle is completed.

## II. BACKGROUND

2. The standard comparative issue designated in NCE proceedings currently inquires into "the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants." *New York University*, 10 RR 2d 215, 217-8 (1967). The Commission also asks whether "other factors" in the record demonstrate that one applicant will provide a superior noncommercial educational broadcast service. *See New York University, supra; see also Carnegie-Mellon Student Government Corporation*, 7 FCC Rcd 3814, 3915-6 (1992). Between 1970 and approximately 1988, NCE *Hearing Designation Orders* contained an additional criterion: the manner in which the proposed operation of the respective applicants meets the needs of the community to be served. *See Pacifica Foundation*, 21 FCC 2d 216, 221 (Rev. Bd. 1970); *Seattle Public Schools*, 103 FCC 2d 862 (1986). *See also Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34 (Rev. Bd. 1984); and *Southeastern Bible College*, 85 FCC 2d 936, 937 (Rev. Bd. 1981).[2]

3. In 1992, we initiated a general proceeding to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Notice of Proposed Rulemaking In the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992) (*"NPRM"*). *See also Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994) (*"NPRM2"*) (soliciting additional comments in light of the appellate decision in *Bechtel v. FCC*, 10 F.3d 874 (D.C. Cir. 1993)). In the *NPRM*, we made the following statement with respect to the criteria used in NCE comparative proceedings:

> Under current practice, applicants for noncommercial stations are not compared using the same criteria as those used for commercial applicants. Instead, noncommercial applicants are evaluated as to the extent to which each of the proposed operations will be "integrated into the overall operations and objectives" of therespective applicants. *New York University*, 10 RR 2d 215, 217-8 ¶ ¶ 8-9 (1967). Upon reflection, it appears that use of such a vague standard may make rational choices among noncommercial applicants difficult, if not impossible. We note, for example, that the Review Board, for this very reason, recently urged the Commission to reexamine the comparative analysis to be applied in these cases. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580 n.8 (Rev. Bd. 1991) (subsequent history omitted).

*NPRM*, 7 FCC Rcd at 2669.

4. We therefore tentatively concluded that the "vague standard" currently used in NCE comparative proceedings "should be eliminated" and that we should consider using a modified version of the "point system" proposed in the *NPRM* for commercial applicants. We invited comments on these proposals and on: (i) whether the criteria used to select commercial applicants were relevant in NCE proceedings; (ii) whether different or additional criteria should

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[1] As a general matter, we do not consider in this proceeding the standards applicable to resolving mutually exclusive applications filed against renewal applicants. Those standards are the subject of a separate proceeding. *See Formulation of Rules and Policies Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 6363 (1989), 4 FCC Rcd 4780 (1989); 3 FCC Rcd 5179 (1988). In those cases, however, in which a renewal applicant is not accorded an expectancy and is not disqualified, that applicant would be compared to any competing applicant using the "new" comparative criteria adopted in this proceeding.

[2] The "community needs" criterion has been omitted from recent NCE *Hearing Designation Orders*. *See Real Educational Foundation of Baton Rouge, Inc.*, 3 FCC Rcd 4359 (M. M. Bur. 1988); *Maricopa Community College District*, 3 FCC Rcd 5637 (M.M. Bur. 1988) and *Cabrini College*, 4 FCC Rcd 5462 (M.M. Bur. 1989). *See also Carnegie -Mellon, supra*. The Review Board recently opined that this unexplained omission must be "in belated obeisance to the Commission's 1984 [Public Broadcasting] *Deregulation Order*" [*Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 98 2d 746 (1984)], which eliminated the formal ascertainment procedures for NCE-FM stations. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2578 (Rev. Bd. 1991).

be used; and (iii) whether a different comparative approach should be followed for state-owned public broadcasters as opposed to other NCE applicants. *Id.*

5. In response, we received six sets of comments from interested parties on June 2, 1992: (i) joint comments from The Association of America's Public Television Stations and National Public Radio ("APTS/NPR");[3] (ii) the National Federation of Community Broadcasters ("NFCB");[4] (iii) joint comments from a group of NCE Broadcasters ("NCE Licensees"),[5] (iv) Valley Public Television, Inc. ("Valley"), (v) the Georgia Public Telecommunications Commission ("GPTC");[6] and (vi) Harry M. Plotkin. APTS/NPR also filed reply comments on June 30, 1992, responding specifically to the submission of NFCB. Finally, APTS/NPR filed brief joint comments in response to *NPRM2* on July 22, 1994.[7]

## III. DISCUSSION

6. We have examined the comments submitted and we conclude that the record is not sufficient to fully decide this issue. We are concerned that the comments received may not be representative of the full range of actual and potential NCE station operators. By separating this proceeding from our ongoing proceeding on comparative criteria for commercial stations and requesting comments specifically addressing the NCE comparative criteria, we hope to give all interested parties a greater opportunity to comment so that the record will be more complete.

7. Most of the existing comments agree on one major point: that the current NCE comparative criteria are inadequate. They also agree on several less critical points, including that: (1) the traditional commercial comparative criteria are inappropriate for NCE applicants; (2) "time-sharing" should be eliminated from consideration in NCE comparative proceedings; (3) auxiliary power should be eliminated as a comparative criterion; and (4) a comparative coverage factor should be applied in some manner. APTS/NPR and NFCB were the only commenters who described detailed alternatives to the existing criteria for selecting from among competing NCE applicants. Their proposals were widely divergent.

8. APTS/NPR urges retaining and "refining" the existing NCE comparative criteria and sets forth three proposed "clarifying guidelines" to facilitate the Commission's evaluation of competing NCE applicants. First, APTS/NPR states that the Commission should examine which applicant will best integrate the station operations with its educational and cultural objectives. In making this evaluation, the Commission should consider, *inter alia*, whether the applicant: (1) has clear, definable educational and cultural objectives; (2) has objectives directed outwardly to the community of license, not exclusively to the licensee; and (3) describes adequately its anticipated program format and plan for program promotion and submits adequate evidence that it can implement its service. Second, the Commission should determine which applicant's proposed operations will "best meet community needs." Here, according to APTS/NPR, the Commission should consider, *inter alia*, whether the applicant: (1) has a reasonable process in place to determine educational and cultural needs; (2) has proposed services and objectives that will meet identified community needs; and (3) has a governing board composition that is broadly representative of the community to be served or, in the case of state/local government licensees, is accountable to the public. Finally, proffers APTS/NPR, the Commission should look to whether "any other factors demonstrate that one applicant will provide superior broadcast service." Such factors would include, *inter alia*, whether an applicant's proposal: (1) would permit operating efficiencies by virtue of "common ownership" of NCE facilities; (2) would demonstrate a workable ability to bring service to unserved or underserved areas; and (3) will use available technology fully. APTS/NPR comments, at 18.

9. NFCB, on the other hand, urges the adoption of an all-or-nothing "point system" which relies on criteria that, for the most part, are not now considered in the NCE context. The factors NFCB suggests are: diversification (3 points); minority control (3 points); spectrum efficiency (a coverage comparison) (3 points); local program origination (2 points); local residence of principals (2 points); and finder's preference (only as a "tiebreaker")(1 point).

10. NFCB did not file reply comments on the APTS/NPR proposal. However, APTS/NPR states in its reply comments that NFCB's proposal is too narrowly focused and will favor only one subset of public broadcaster -- the small community radio station -- "without a corresponding increase in the likelihood that these stations will better serve the Commission's objectives [for NCE service]." APTS/NPR reply comments, at 11. The disparity in viewpoints leads us to believe that we should seek further comments from other interested parties on the proposals made by APTS/NPR and NFCB and on related issues, as well as the submission of alternative proposals.

## IV. QUESTIONS FOR COMMENT

11. Accordingly, we now seek additional comments on the following issues:

1. Generally, whether the existing NCE criteria should be retained and, if so, whether the "refinements" to the criteria proposed by APTS/NPR are

[3] APTS represents most of the nation's public television stations. NPR represents approximately 500 full service public radio stations.

[4] At the time comments were filed, NFCB had a membership of 62 participating community broadcasters and 115 affiliates.

[5] The NCE Licensees are: Arizona Board of Regents for Benefit of the University of Arizona, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Central Michigan University, Columbia College, Iowa Public Broadcasting Board, Kent State University, KVIE, Inc., Nevada Public Radio Corp., the Ohio State University, State of Wisconsin-Educational Communications Board, and WAMC.

[6] GPTC's "comments" consisted of the submission of the "Brief and Exceptions" filed with the Review Board in a comparative proceeding for a new commercial channel in Roswell, New Mexico, MM Docket No. 89-337. The submission does not specifically address the NCE comparative criteria.

[7] Jimmy Swaggart Ministries, Inc. ("JSM") later filed comments in response to the Commission's *Order*, FCC 94I-072, Mimeo No. 42769 (released September 2, 1992), issued subsequent to a voluntary remand of the appeal of the grant of JSM's application for a new NCE FM station. Those comments have been consolidated into the record here.

appropriate? Specifically, are certain of the the APTS/NPR proposals, including, for example, the proposals to favor applicants with objectives that are "directed outwardly to the ... listening community, and not exclusively to the licensee itself," to favor applicants with a governing board that "is broadly representative of the community to be served," and to favor applicants who can demonstrate operating efficiencies through "common ownership," likely to unfairly disadvantage certain types of applicants and why?

2. Should the factors enumerated in (1) above and/or other factors APTS/NPR proposed be eliminated or modified? Should the factors proposed by APTS/NPR be weighted in the manner suggested? If factors in addition to those proposed by APTS/NPR should be considered, what are they and how should they be weighted?

3. Should a "point system" be adopted in place of the existing NCE comparative criteria, as proposed by NFCB? If so, are NFCB's proposed comparative factors both appropriate and comprehensive, and are the weights suggested by NFCB appropriate? If not, what factors should be considered and how much weight should be given to each factor. Additionally, what factor(s) should be employed as a "tiebreaker," and how should those factors be applied?

4. What would be the impact of both the APTS/NPR and NFCB proposals on the universe of potential applicants, *i,e,,* do either or both proposals accommodate the wide variety of applicants currently eligible to apply for NCE stations?

5. Would some system other than the two proposed in comments currently before us better serve the Commission's goals in selecting among noncommercial educational applicants, and if so, how should that system be structured?

6. Should the mandatory "share-time" arrangement consideration be retained as a means of resolving NCE mutually exclusive groups?

7. Should a different comparative approach be followed for state-owned public broadcasters as opposed to other NCE applicants and, if so, how should this separate comparative approach be structured?

8. Should the Commission impose a "holding period" for NCE stations granted as a result of comparative hearing to insure the continued viability of the criteria used in the selection process, as stressed in *Bechtel v. FCC, supra,* or should some other mechanism be employed for that purpose?

12. *Additional Considerations.* We have previously indicated that the current NCE comparative standards are vague and difficult to apply. *NPRM, supra,* 7 FCC Rcd at 2669. Because we are here instituting a rulemaking to develop new standards for choosing among mutually exclusive applicants, we believe it inappropriate to continue to designate mutually exclusive NCE applications for hearing under the existing comparative criteria. Similarly, we believe it is inappropriate to continue to adjudicate under the existing comparative criteria pending hearing proceedings involving mutually exclusive proposals for new noncommercial broadcast facilities. Therefore, we are as of the release date of this *Notice* imposing a partial freeze on the processing of NCE-FM applications. In light of this freeze, we will, as noted in paragraph 1, *supra,* make every effort to resolve the questions addressed herein as quickly as possible.

13. We will continue to accept NCE applications and to process those NCE applications which are not mutually exclusive, and we will continue to rule on and approve appropriate universal settlements among mutually exclusive NCE applicants. Until we have adopted new or revised NCE-FM comparative criteria in this proceeding, however, we will not designate mutually exclusive NCE applications for comparative hearing. Further, as of the release date of this *Notice,* the Administrative Law Judges, the Review Board, and the Commission will no longer issue decisions in pending hearing proceedings involving competing applicants for NCE broadcast facilities where those decisions would rely upon the existing comparative criteria for NCE applicants. To avoid unnecessary delay, however, the Administrative Law Judges, the Review Board, and the Commission will continue to facilitate, consider, and approve, where appropriate, settlements among NCE applicants now involved in hearing proceedings provided such settlements are consistent with current Commission policies governing those agreements.

14. In light of our decision here to hold relevant pending hearing proceedings in abeyance until such time as we adopt new or revised comparative criteria, we solicit comments as to how we should apply any newly adopted criteria to these cases. For example, should we permit applicants in these cases to file one-time as-of-right amendments for purposes of taking into account the new or revised criteria?

## V. PROCEDURAL MATTERS

### A. Ex *Parte* Rules -- Non-restricted Proceeding

15. This is a non-restricted notice and comment Rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules.

### B. Regulatory Flexibility Act

16. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this *Notice.*

### C. Authority

17. Authority for the Rulemaking action is contained in 47 U.S.C. §§154(i), 154(j), 303(r), 309(g), 309(i), 403.

## VI. ORDERING CLAUSES

18. ACCORDINGLY, IT IS ORDERED, that NOTICE is hereby given of the proposed regulatory changes describe above, and that COMMENT IS SOUGHT on the issues listed above.

19. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before **April 24, 1995**, and Reply comments shall be filed on or before **May 10, 1995**. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an

original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Chief, Mass Media Bureau, Room 314, 1919 M Street, N.W., Washington, D.C. 20554. Commenters should also file one copy of any documents filed in this docket with the Commission's duplicating contractor, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

20. For further information, contact Michael F. Wagner, (202) 418-2720, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX

### INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

**Reason for Action**

The Commission has previously determined that the criteria used to select from among competing applicants for new noncommercial educational applicants were vague and difficult to apply.

**Objectives**

The Commission seeks to adopt more meaningful criteria and to adopt a simplified hearing process to select new noncommercial educational broadcast licensees on an expedited basis.

**Legal Basis**

Action is being taken pursuant to 47 U.S.C. §§154(i) and (j), 303(r), 309(g) and (i), and 403.

**Reporting, Record-Keeping, and Other Compliance Requirements**

This proposal would reduce such requirements by eliminating and simplifying litigation involved in prosecuting a mutually exclusive application for a new noncommercial educational broadcast facility.

**Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules**

None

**Description, Potential Impact, and Number of Small Entities Affected**

This proposal would benefit all small noncommercial educational entities seeking a new noncommercial educational broadcast facility by reducing and simplifying the administrative burdens associated with the comparative hearing process.

**Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objectives**

None

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket Nos. 94-103, 94-105, 94-106, 94-108**

In the Matter of

Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii

Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates

Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut

Petition to Extend Rate Regulation Filed by the New York State Public Service Commission

**Adopted: February 9, 1995; Released: February 9, 1995**

By the Chief, Wireless Telecommunications Bureau:

**ORDER**

## I. INTRODUCTION

### A. Background

1. The Wireless Telecommunications Bureau ("Bureau") on January 25, 1995, adopted and released an Order ("*First Confidentiality Order*")[1] that determined the status of certain materials for which confidential status was requested by California and Connecticut, states that seek intrastate rate authority over commercial mobile radio services (CMRS) providers.[2] The *First Confidentiality Order* established procedures for treatment of such materials, and permitted subsequent confidentiality requests by Hawaii and New York, as well as re-submission by California and Connecticut of requests for confidentiality and associated materials that had not been properly submitted.[3]

2. In general, these states requested confidential treatment of materials filed, or sought to be filed, in support of their petitions, because those materials were obtained subject to confidentiality claims of carriers subject to the states' jurisdiction. The *First Confidentiality Order* permitted Hawaii and New York to submit supplemental materials referenced in their original petitions, provided such filings were accompanied by requests for confidential treatment as required by Section 0.459 of the Commission's Rules.[4] Neither of those states has chosen to do so, and thus the opportunity to make supplemental confidential filings has expired.[5] This *Second Confidentiality Order* resolves confidentiality issues arising from the supplemental filings, or from the failure to submit materials in accordance with requirements specified in the *First Confidentiality Order*.

### B. Summary of Decision

#### 1. Connecticut.

3. In the *First Confidentiality Order*, we noted that the state of Connecticut had recently filed additional materials accompanied by an apparently sufficient motion that we accept the materials for filing and a request that we afford confidential treatment to those portions of the filing submitted under seal.[6] We stated that we would address that motion shortly.[7] In this Order, we grant the Connecticut Motion in part and deny it in part. We accept those parts of the Connecticut filing that were not subject to a request for confidential treatment, listed in Section 1 of Appendix A. We accept and order limited disclosure, under the terms of a protective order, of those parts of the filing that were subject to a request for confidential treatment in this proceeding. Connecticut's request for confidentiality does not

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[1] Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-111, adopted Jan. 25, 1995, released Jan. 25, 1995 (*First Confidentiality Order*).

[2] The captioned states petitioned for such authority under Section 332(c)(3) of the Communications Act. *See* Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, § 6002(c)(3), 107 Stat. 312, 394 (1993) (*codified at* Section 332(c)(3) of the Communications Act of 1934, 47 U.S.C. § 332(c)(3)).

[3] The materials involved were referenced in proceedings regarding the petitions filed by the People of the State of California and the Public Utilities Commission of the State of California (collectively, "CPUC" or "California"); the Connecticut Department of Public Utility Control ("DPUC" or "Connecticut"); the Public Utilities Commission of the State of Hawaii ("HPUC" or "Hawaii"); and the New York Department of Public Service ("NYDPS" or "New York").

[4] *First Confidentiality Order*, para. 6.

[5] On January 27, 1995, New York filed a letter with the Commission stating that it will not seek confidential treatment of additional data to support its petition. Letter from M. Helmer, General Counsel, State of New York Public Service Commission, to W. Caton, Acting Secretary, Federal Communications Commission (Jan. 27, 1995). As of the date of this Order, Hawaii has not made a filing to supplement its petition.

[6] *See First Confidentiality Order*, at para. 5; Connecticut, Motion for Leave to Accept Record and Request for Confidential Treatment, PR Docket No. 94-106, filed Jan. 9, 1995 ("Connecticut Motion").

[7] *See First Confidentiality Order*, para. 5.

satisfy the requirement under Section 0.459(b) of the Commission's Rules that requesters provide reasons for a confidentiality request and the facts upon which those reasons are based.[8] We grant the request in part, however, under discretion provided by Section 0.459(f) of the Commission's Rules.[9] Materials treated as confidential, and to be disclosed under the terms of a protective order, are listed in Section 2 of Appendix A. Finally, we do not grant Connecticut's request for confidential treatment of certain materials listed in Section 3 of Appendix A. These elements of the Connecticut submission not only lack the justification required by Section 0.459 of our Rules[10] to accompany Connecticut's request for confidential treatment, but also present additional difficulties for staff review and/or procedural implementation.

**2. California.**

4. In the *First Confidentiality Order*, we ordered California to file newly redacted and unredacted versions of its petition and accompanying appendices, in accordance with our confidential treatment determinations in that Order.[11] California complied with that Order, by submitting the required materials on February 2, 1995, and we now establish comment and reply dates.[12] In the *First Confidentiality Order*, we also stated that California could remedy procedural defects in its requested confidential filing of excerpted materials obtained from the state's Attorney General ("AG Excerpts"), by re-submitting that filing accompanied by appropriate affidavits or other evidentiary materials.[13] California chose to make such a remedial filing, and in this Second Order, we order limited disclosure of the AG Excerpts, subject to the terms of a protective order.

**3. Other filings.**

5. We stated in the *First Confidentiality Order* that if AirTouch Communications (AirTouch) and the Cellular Telecommunications Industry Association (CTIA) wish the Bureau to consider the affidavits of economist Jerry Hausman that were appended to their Oppositions to the California Petition, they must file information underlying those affidavits.[14] AirTouch made such a filing, and noted that it had previously provided such information to the CPUC.[15] The Commission therefore will consider the Hausman affidavit accompanying the AirTouch Opposition as it examines the merits in this proceeding. CTIA did not submit the described filing, and asserts that it has neither custody nor control of the data and cannot obtain the consent of individual carriers in the short time available.[16] Accordingly, the Hausman affidavit accompanying the CTIA Opposition will not be considered.

## II. REQUESTS FOR CONFIDENTIAL TREATMENT

**A. Connecticut**

6. Connecticut initially submitted supporting materials for its petition to retain regulatory control of the rates of wholesale cellular service providers. These materials were accompanied by two requests for confidential treatment, but failed to comply with the Commission's procedural rules. On January 20, 1995, Connecticut re-submitted its request.[17] In our *First Confidentiality Order*, we noted that the new submission appeared to comply with Section 0.459 of the Commission's Rules, but we deferred making any decision regarding the materials until we had an opportunity to review them more thoroughly.[18]

7. After further review, we have determined that Connecticut's request for confidential treatment fails to satisfy the requirements stated in Section 0.459(b) of the Commission's Rules,[19] that such requests state the reasons for withholding materials from inspection by the public, and specify the facts on which those reasons are based. In common with publicly disclosable materials, such confidential materials must also be clearly and specifically related to the contentions they are offered to support.[20] Given the need to expedite this proceeding to meet the statutory deadline, however, we have determined neither to deny Connecticut's request, nor to provide Connecticut additional time to cure its request. Rather, Bureau staff has conducted an independent review of these materials, in an effort to expedite the resolution of confidentiality issues and complete the record. For these limited purposes, we waive Section 0.459(b) on our own motion. *See also* Section 0.459(f), which applies to deficient requests for confidential treatment as well as materials submitted without an associated request. As described below, that review indicates that, with some exceptions, the materials submitted by Connecticut for which confidential treatment is requested are germane to the state's petition and warrant confidential treatment. We accordingly will consider as confidential most of the materials re-filed by Connecticut, but subject them to limited disclosure, pursuant to terms of the protective order already in force in the Connecticut cellular proceeding.[21]

8. In Section 2 of Appendix A, we list in full those materials that generally include the type of proprietary operating and marketing data that the *First Confidentiality Order* determined warrant confidential treatment. As we noted in the *First Confidentiality Order*, the Commission has previously determined that data describing a carrier's profit margins, as well as a company's actual costs, breakeven calculations, and profits and profit rates, and also market share information, are confidential and disclosure

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[8] *See* 47 C.F.R. § 0.459(b).
[9] *See* 47 C.F.R. § 0.459(f).
[10] *See* 47 C.F.R. § 0.459.
[11] We granted California's Emergency Motion for Extension of Time on Jan. 30, 1995. *See* Order, PR Docket No. 94-105, DA 95-124, adopted January 30, 1995, released January 31, 1995.
[12] *See infra*, para. 25.
[13] *See First Confidentiality Order*, at para. 33.
[14] *Id.*, para. 38.
[15] See letter from D. Gross, AirTouch Communications (AirTouch) to W. Caton, Acting Secretary, Federal Communications Commission, dated Jan. 27, 1995.
[16] CTIA, Comments in Response to *First Confidentiality Order*, submitted Jan.30, 1995.
[17] *See* letter from M. Kohler, Assistant Attorney General, State of Connecticut, to W. Caton, Acting Secretary, Federal Communications Commission, PR Docket No. 94-105, dated Jan.9 , 1995, filed Jan.20, 1995 ("Third Connecticut Request").
[18] *See First Confidentiality Order*, at para. 5.
[19] *See* 47 C.F.R. § 0.459(b).
[20] *See* Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 739 (D.C. Cir. 1976).
[21] That Order was adopted for this proceeding in the *First Confidentiality Order* as Appendix B.

would be likely to result in competitive harm.[22] For those reasons, we granted California's request that we accord confidential treatment to information including, *inter alia*, annualized per-subscriber data on revenues, operating expenses, operating income, and expenditures for plant; annualized subscriber growth for each carrier; information regarding cellular carriers' and resellers' market shares, capacity utilization statistics, the number of subscribers provided with service by each carrier on each specific basic rate plan, and the aggregate number of customers associated with all discount plans of a given carrier.[23]

9. Similarly, we here grant Connecticut's request that we accord confidential treatment to the January 20 materials that were covered by its protective order, for those elements listed in Part 2 of Appendix A. These materials contain financial information disclosing profit margins,[24] actual costs,[25] market share information,[26] and similar financial data.[27] We also include in Section 2 the brief of the Connecticut Attorney General, June 29, 1994, which clearly identifies confidential segments involving various economic data. Disclosure of these types of information could identify to competitors particular product or geographic markets or market trends, thereby causing competitive harm.[28]

10. We find that the Section 2 information, as described *supra* in paragraphs 7-13, 16, is likely to be useful to the Commission's analysis on the merits. Connecticut states in its petition that it intends to investigate rates of return and rate structures of wholesale providers, and the relationship between cellular carriers' costs and service rates.[29] Connecticut argues that Herfindahl-Hirschman concentration indices demonstrate a minimal threat to incumbents from competitive service providers, and that while carriers argued that vigorous competition exists, resellers contend the Connecticut market's duopoly characteristics enable underlying carriers to exercise substantial market power and impose excessive and unjust rates.[30] The underpinnings for these assertions are contained in the August 8, 1994 DPUC decision in Docket No. 94-03-27, attached to the Petition as Appendix A.

11. Thus, the data elements listed in Section 2 could easily constitute logical and relevant foundations for the arguments they are offered to prove, and we find that those arguments are germane to the demonstration Connecticut is required to make, under Section 20.13 of the Commission's Rules,[31] to support its petition regardless of whether they are ultimately persuasive. Accordingly, the submissions could well constitute a link in the chain of evidence leading to the Commission's ultimate decision on the merits. The Section 2 data is sufficiently germane to disposition of Connecticut's petition that it cannot be excluded from consideration of the issues on the merits. Such exclusion would in effect deny Connecticut the opportunity to make the demonstration, required by Congress and detailed in Section 20.13 of the Commission's Rules, by submitting relevant information. It is therefore desirable to afford the public an opportunity to comment on this data. Unlimited disclosure is not appropriate, however, due to the potential for competitive injury. Accordingly, we adopt the Protective Order attached as Appendix B to the *First Confidentiality Order* for use in this aspect of the Connecticut proceeding, and we order limited disclosure, pursuant to the Protective Order, of the data elements listed in Section 2.

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[22] *See* First Confidentiality Order, ¶ 24, *citing, inter alia*, Request of R. May, FOIA Control No. 91-130, at 3 (1991) (withholding AT&T cost data associated with its provision of operator services) (*citing* National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976) (*National Parks II*); Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); Request of M. Stabbe, *supra*, at 3-4 (Feb. 7, 1992) (disclosure of percentage of subscribers on inside wire maintenance plans would reveal market concentrations and strategic initiatives by wireline carrier and could aid a new competitor by describing market trends or an existing competitor by identifying regions ripe for expansion); *but cf.* Request of R. Berg, at 5 (ordering disclosure of information related to interexchange carrier (IXC) market shares; also noting that relative market positions of various IXCs are already generally known).

[23] These materials were made subject to limited disclosure pursuant to the terms of a protective order, except that certain of these data elements pertaining to six particular carriers were subject to public disclosure because those carriers withdrew their confidentiality interests in those data.

[24] *See, e.g.*, App. A Sec. 2 element a, Springwich late-filed Exhibit 4, projection of five-year incremental costs including net cash flow after tax, annual operating expenses and revenue; App. A Sec. 2 element h, Bell Atlantic Metro Mobile late-filed Exhibit 15, describing four years' actual revenues and expenses for wholesale operations,, including net income; App. A Sec. 2 element d, Springwich forecasted revenue calculations for five years.

[25] *See, e.g.*, App. A Sec. 2 element a, Springwich late-filed Exhibit 4, five-year estimate of incremental costs.

[26] *See, e.g.*, App. A Sec. 2 element b, Springwich responses to request Nos. TE-5, TE-6, describing cellular end-user churn rate and monthly usage for individual resellers.

[27] *See, e.g.*, App. A Sec. 2 element a, Springwich late-filed Exhibit No. 7, actual/forecast customers compared to switch capacity; Sec. 2 element b, Springwich financial statements, balance sheets, and changes in partners' capital contributions; Sec. 2 element e, Springwich late-filed Exhibit No. 28, detail of actual charges from affiliates to Springwich Cellular Limited Partnership (four years); Sec. 2 element f, Litchfield responses to interrogatories TE-3 and TE-6, financial statements.

[28] *See, e.g.*, letter from K. Shinevar, Vice President, General Counsel, CellularOne, to R. Murphy, Executive Secretary, DPUC (filed with the DPUC on May 5, 1994, received by the DPUC on May 6, 1994), attaching Litchfield County Cellular, Inc. (Litchfield) responses to certain CPUC Interrogatories. The Litchfield response to interrogatory TE-3 attaches financial reports for the years ending Jan.31, 1991 and Jan.31, 1992 as Appendices B and C (B was in fact later filed under letter dated May 18, 1994), including balance sheets showing assets and liabilities, operating expenses and losses, cash flows and increase in cash. *See also, e.g.*, letter from P. Tyrrell, Senior Attorney, Springwich Cellular Limited Partnership (Springwich), to R. Murphy (June 6, 1994), *attaching* the Springwich late filed Exhibit No. 3, Attachments A & B (revision dated June 6, 1994) (Springwich's five year projection of its cellular numbers service market share and subscriber base, given various hypothetical marketplace actions by competitors); letter from R.P. Knickerbocker, Jr., outside counsel for the Bell Atlantic Metro Mobile Companies (BAMMC), to R. Murphy (May 27, 1994), *attaching* the Bell Atlantic Metro Mobile Companies (BAMMC) late filed Exhibit No. 17 (dated May 27, 1994) (BAMMC's statements of assets, liabilities, revenues and expenses for its wholesale operations).

[29] Connecticut Petition at 4.

[30] *Id.*

[31] *See* 47 C.F.R. § 20.13.

12. Our finding that substantial competitive harm is probable does not automatically lead to withholding of desired information, because the Commission's Rules and the FOIA provisions they reflect are exemptions from required disclosure; they are not categorical bars to disclosure. Even when information falls within the scope of FOIA Exemption 4, the Commission retains discretion to order release based on public interest grounds.[32] In determining whether the public interest in disclosure is sufficiently compelling to outweigh a legitimate interest in the privacy of proprietary business data, the Commission has adhered to a policy whereby it:

> will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue.[33]

Alternatively, even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA[34] may outweigh the public benefit in disclosure.[35] In such instances, disclosure under a protective order may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose.[36] The public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds.[37] The courts have upheld agency nondisclosure of information where the material is not of decisional significance or where its omission from the record does not deprive parties of notice and a meaningful opportunity to comment.

13. The Commission and staff have applied these principles in analogous cases. In AT&T, FOIA Control No. 99-190, the Common Carrier Bureau distinguished between material of "critical significance" and data providing a "factual context" for the consideration of broad policy issues. The Bureau stated that resolving a confidentiality request entails determining not only the extent to which data might be helpful, but further whether its value outweighs the prospect of competitive harm likely to flow from release.[38] We considered the parties' comments and submissions, and we independently balanced the public interest in revealing the information and the private harm that could result from disclosure.[39]

14. However, there are several items included with the Connecticut refiling that not only lack the justification required to be supplied by Sections 0.457(d)(2)(i) and 0.459(a) & (b) of the Commission's Rules,[40] but also for which we cannot determine the confidentiality of on their face. These are listed in Section 3 of Appendix A, and include (a) depositions taken in the state proceeding, from which selected parties were excluded;[41] (b) one document presenting compilation of data with no identification except an exhibit number;[42] and (c) documents that do not explicitly identify the segments arguably warranting confidential treatment.[43] Some documents involves parties that did not sign the Connecticut protective order.[44] Nor is it readily apparent to what extent Connecticut may have relied on the submitted materials in its petition for authority to extend rate regulation of cellular radio service, nor in its reply comments to the Commission.

15. The Bureau has exerted significant effort to expedite consideration of these petitions and avoid delays associated with curative filings. We cannot, however, comb through supposedly confidential and germane documents page by page, or paragraph by paragraph, to construct the petitioner's showing of relevance to particular contentions in

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[32] *Chrysler v. Brown*, 441 U.S. at 292-94; note 78, *infra*.

[33] *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978).

[34] Under the FOIA, disclosure to one party generally compels disclosure to all parties. United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989).

[35] *See, e.g.*, Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526, 1533 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*), *aff'd*, Order, 9 FCC Rcd 180 (1993); Memorandum Opinion and Order, In the Matter of Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band, ET Docket No. 92-28 PP-32, FOIA Control Nos. 92-83, 92-88, 92-86, 7 FCC Rcd 5062, 5062 & n.7 (1992); *see also* Letter from G. A. Weiss, Acting Chief, Enf. Div., Common Carrier Bureau, FCC, to F. J. Berry, AT&T, 9 FCC Rcd 2610, 2613 (Enf. Div., Com. Car. Bur. 1994) (McCaw/AT&T Protective Order attached), *amended*, Letter from T. D. Wyatt, Chief, Formal Compl. & Inves. Branch, Enf. Div., Common Carrier Bureau, FCC, to Counsel for Parties of Record (dated May 20, 1994); In the Matter of American Telephone and Telegraph Co. and Craig O. McCaw, FCC No. 94-238, 9 FCC Rcd 5836, 5925 (denying Bell Companies' motion to waive the McCaw/AT&T Protective Order).

[36] *See id.*

[37] *See, e.g.*, Abbott Laboratories v. Young, 691 F. Supp. 462, 466-67 (D.D.C. 1988), remanded on other grounds, 920 F. 2d 984 (D.C. Cir. 1990), cert. denied *sub nom.* Abbott Laboratories v. Kessler, 112 S. Ct. 76, 116 L. Ed.2d 49 (1991).

[38] AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988). *See also* Butler, 6 FCC Rcd 5414, 5418 (1991).

[39] 47 C.F.R. § 0.461(f)(4); *see also, e.g.*, AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988).

[40] 47 C.F.R. § 0.457 (d)(2)(i) and 47 C.F.R. § 0.459(a) & (b).

[41] *E.g.*, Confidential Hearing Before DPUC, Docket No. 94-03-27, June 7, 1994 (Springwich excluded) ("June 7 Hearing").

[42] *See* Late-filed Ex. 29, June 7, 1994.

[43] *See, e.g.*, Brief of the Office of Consumer Counsel, June 29, 1994 (no portion identified as confidential); separate segment of June 7 Hearing, pp. 1440-1545, *supra* note 41 (indicated as confidential but parties excluded, if any, not identified); additional segment of June 7 Hearing, pp. 1580-1607; additional transcript segment of June 7 Hearing, pp. 1194-1372; additional segment of June 7 Hearing, pp. 1546-1579. *See also* Initial Brief of Springwich Cellular Limited Partnership, Protected Version, Docket No. 94-03-27, June 29, 1994.

[44] *See* Cellular Resellers Coalition Brief, Non-Public Version, Docket No. 94-03-27, June 29, 1994. While participation in the protected disclosure arrangements at the state level is not a requirement for participation in such arrangements in this proceeding, we are particularly concerned, in reviewing materials not accompanied by a properly specific confidentiality request, to preserve, as an initial matter, the confidentiality concerns of parties that did not agree to the protected disclosure process below.

its petition, and related demonstrations of confidential status and prospects of competitive harm. While a publicly disclosable filing may not be germane to the petition, the determination under our Rules whether to allow protected disclosure of confidential materials requires that we consider the benefit to the public of such disclosure, and the disclosure of irrelevant information confers no public benefit.

16. Accordingly, we grant in part and deny in part the Connecticut motion to accept its supplemental filing. We will publicly disclose those parts of the Connecticut filing that were not subject to a request for confidential treatment. We will disclose, under the terms of the protective order adopted for Connecticut in Appendix B of the *First Confidentiality Order*, those parts of the filing that were accorded confidential treatment in the Connecticut cellular investigation. The submitted materials listed in Section 3 of Appendix A to this Order, however, will not be considered by the Commission because, as described *supra* paragraph 14, they either were not referenced to elements of the state's petition – *i.e.*, their relation to contentions in that petition has not been specifically asserted – or the portions of documents that resulted in confidential treatment in the state proceeding are not sufficiently identified in the documents to enable staff review of public benefits or competitive harm possible from disclosure.

**B. California**

**1. Background**

17. California originally requested confidential treatment of several types of commercial and financial materials that it submitted under seal with the Commission and redacted from its publicly filed petition.[45] In the *First Confidentiality Order*, we categorized the California data into three groups (A, B, and C), which we defined according to the treatment accorded those materials at that juncture.[46] We permitted public disclosure of the Group A materials,[47] adopted a Protective Order for materials in Group B, and determined that it was unnecessary to consider whether materials in Group C merited confidential treatment at that time.[48]

18. We have reviewed the resubmitted California materials and conclude that the Group B materials may be disclosed as submitted, subject to the protective order attached to the *First Confidentiality Order* as Appendix A. California has properly removed from Appendix J the data elements that we found in the *First Confidentiality Order* were immaterial to California's petition (*e.g.*, the subscriber counts for individual rate discount plans).

19. For present purposes, therefore, we need consider only the treatment to be accorded the Attorney General (AG) Excerpts provided as part of California's resubmission of Group C materials. The AG Excerpts consist of references on pages 42, 45, and 75 of the unredacted California petition to materials that California asserts were acquired in the course of an ongoing antitrust investigation and submitted to the CPUC by the state Attorney General's office, on condition that the materials would not be disclosed publicly without the Attorney General's consent.[49] California initially requested confidential treatment for these materials, citing as the bases for nondisclosure Sections 0.457(c) and 0.457(e) of the Commission's Rules,[50] which parallel Exemptions 3 and 5 of the Freedom of Information Act ("FOIA").[51] The AG Excerpts are based on internal cellular company documents that did not appear in full in the confidential version of the California petition.[52] We stated in our *First Confidentiality Order* that the AG materials would not be considered by the Commission, because California did not accompany this element of its submission with affidavits as required by Section 20.13(2)(vi) of the Commission's Rules,[53] which expressly requires that allegations relevant to anti-competitive or discriminatory practices or behavior be supported by an affidavit from an individual with personal knowledge. Moreover, California did not initially submit source materials, or other indicia of context or credibility, for the allegations in the CPUC petition that supposedly were supported by reference to the AG Excerpts. We stated that California could choose to re-file the Excerpts if the new submission were accompanied by supporting materials that comply with Section 20.13 of the Commission's Rules and a request for confidential treatment.[54]

20. California has chosen to file the AG Excerpts a second time, accompanied by a renewed request for confidential treatment of these materials, and by supporting materials that the state asserts comply with Section 20.13 of the Commission's Rules. For reasons discussed below, we determine that this latest California submission complies with Sections 0.457, 0.459, 0.461, and 20.13 of the Commission's Rules,[55] and that the AG Excerpts are in fact entitled to confidential treatment. We also find that the AG Excerpts are relevant and material to California's showing in this proceeding, and that prospects of competitive harm from any public disclosure are outweighed by the benefit of limited disclosure subject to a protective order, which will allow parties to this proceeding to comment on

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[45] *See* California, Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates (California Petition); *First Confidentiality Order*, at para. 7.

[46] *See First Confidentiality Order* at para. 8.

[47] Group A materials related to US West, however, as well as the other carriers that did not withdraw their claims of confidentiality, were subjected only to limited disclosure pursuant to protective order .

[48] *See First Confidentiality Order*, at para. 33.

[49] *See* Request for Proprietary Treatment of Documents used in Support of Petition to Retain Regulatory Authority over Intrastate Cellular Service Rates, P.R. File No. SP-3, at 2-3 (filed Aug. 9, 1994) ("California Confidentiality Request"); September 14 Submission, at 2.

[50] 47 C.F.R. §§ 0.457(c) and 0.457(e).

[51] *See* September 14 Submission; September 16 Submission. Exemption 3 of the FOIA exempts from mandatory disclosure material "specifically exempted from disclosure by statute . . .," and Exemption 5 exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to any party other than an agency in litigation with the agency." *See* 5 U.S.C. §§ 552(b)(3), (5).

[52] The confidential submission consists solely of the excerpts set forth in the text of the unredacted petition.

[53] 47 C.F.R. § 20.13(2)(vi).

[54] *See First Confidentiality Order*, at para. 33. We required California to make this submission by January 30, 1995, and later extended the time for the filing to February 2, 1995. *See* Order, DA 95-124, *supra* note 11.

[55] 47 C.F.R. §§ 0.457, 0.459, 0.461, and 20.13.

them.[56] We therefore order disclosure of the AG Excerpts under the terms of the Protective Order adopted as Appendix A of the *First Confidentiality Order*.

21. In a separate Petition for Clarification and Corresponding Extension of Time, submitted Jan.27, 1995 (California Clarification Petition), California states that the AG Excerpts concern marketing practices of certain cellular carriers and do not allege anti-competitive behavior.[57] California therefore objects to our requirement in the *First Confidentiality Order* that the excerpts be supported by an affidavit from a person with personal knowledge.[58] California asks why, if an affidavit from the cellular carrier preparing the source document underlying AG Excerpts is required by Section 20.13 of the Commission's Rules, a similar affidavit requirement is not imposed upon AirTouch and CTIA regarding the carrier-specific data relied on by Dr. Jerry Hausman.[59] California further contends that the *First Confidentiality Order* practically precludes the CPUC from relying on the AG information, because obtaining an affidavit from carrier personnel with direct knowledge of marketing plans would entail deposing them, and the Commission has not permitted formal discovery in these proceedings. California also implies that the CPUC does not possess subpoena powers under state law for this purpose.[60]

22. In its Opposition to California's Petition, submitted February 1, 1995 (AirTouch Opposition to California Clarification Petition), AirTouch contends that California's initial submission ignored the affidavit requirement, avers the evidentiary requirement should not now be disregarded, and characterizes the clarification request as an untimely petition for reconsideration of the evidentiary standard established by the *Second CMRS Report and Order* that adopted Section 20.13.[61] AirTouch states that the CPUC conducted discovery in its own investigation, undertaken to collect evidence to support its Petition, and so cannot invoke the lack of discovery under Commission procedures to justify its noncompliance with Section 20.13. AirTouch adds that the pricing data relied on by Hausman was not submitted to support allegations of anti-competitive conduct.[62]

23. In its Reply to the AirTouch Opposition, submitted February 3, 1995, California contends the marketing strategy information submitted by cellular carriers to the Attorney General and then obtained by the CPUC is no different than the type of financial and subscriber information submitted directly to the CPUC by those carriers.[63] Neither source of information, California argues, itself contains allegations of anticompetitive or discriminatory conduct, so that the affidavit requirement is inapplicable, and AirTouch should not be permitted to defeat the CPUC petition by preventing the submission of material and relevant information.[64]

24. The *First Confidentiality Order* restated the requirements of Section 20.13 of the Commission's Rules. Based on brief excerpts referenced by CPUC's Petition and the absence of any further explanation, the Bureau initially considered CPUC's AG submission as raising anti-competitive abuse issues.[65] We gave the CPUC an opportunity to resubmit the AG materials and satisfy the affidavit requirement of Section 20.13. As described *infra*, the CPUC resubmitted the AG materials and clarified that the materials were not proffered to allege anti-competitive behavior: California clearly stated in its resubmission of the AG materials that the information concerns the marketing practices of certain cellular carriers and does not allege anti-competitive behavior.[66] Thus, California did not submit supporting affidavits. We conclude, based on California's clarification, that the AG materials are submitted to demonstrate marketing practices, not anti-competitive behavior, and thus need not be supported by affidavit. We will accept the AG materials, consider them only for the purpose proffered, and as explained *infra* at paragraphs 28-34, will disclose the AG materials subject to protective order.

**2. Comments**

25. AirTouch and the Los Angeles Cellular Telephone Company (LACTC) assert that the CPUC violated both state law and CPUC's own rules regarding disclosure by ignoring the public record in the California proceeding and relying upon confidential information obtained from the Attorney General.[67] LACTC also asserts that disclosure would compromise the ability of California cellular carriers to obtain a fair adjudication in any proceeding that flows from the California AG's investigation and also in this proceeding.[68] Any disclosure of this information, even under protective order, in any setting other than a public adjudicatory proceeding in the state of California where "proper rebuttal can take place" would be improper.[69] According to LACTC, disclosure would violate California law and Section 0.457(g) of the Commission's rules, which covers investigatory records compiled for law enforcement purposes.[70]

26. The Cellular Carriers Association of California (CCAC) asserts that information contained in the Attorney General's investigation could be exploited by a competitor if that competitor implies to the public that a specific carrier is engaged in unlawful conduct. This, the CCAC states, could deprive the carrier of its right to an impartial adjudication of the matters under investigation.[71] McCaw

[56] Because parties commented previously on the use of Attorney General materials, we do not defer resolution of this issue for additional comments. As noted *infra*, parties wishing to challenge the confidentiality analysis of the AG Excerpts may file applications for review prior to February 17, 1995.
[57] California Clarification Petition at 4.
[58] *Id.* at 5.
[59] *Id.* at 6.
[60] *Id.* at 5.
[61] AirTouch Opposition to California Clarification Petition at 5-6.
[62] The issues arising from the Hausman materials submitted by CTIA are considered *infra* at paras. 35-38.
[63] CPUC Reply to AirTouch Opposition at 2.
[64] *Id.* at 2.
[65] *First Confidentiality Order* at para. 33.
[66] California Clarification Petition at 4.
[67] AirTouch Comments on Draft Protective Agreement, at 3; LACTC Comments on Draft Protective Agreement, at 6-8.
[68] *Id.* at 8.
[69] LACTC Comments on Draft Protective Agreement, at 7-8.
[70] LACTC Comments on Draft Protective Agreement, at 6-8.
[71] CCAC Comments on Draft Protective Agreement, at 8.

asserts that no information obtained by the CPUC from the California Attorney General, nor any carrier-specific information, should be released under any circumstances, and such information should be returned immediately to the CPUC.[72] US West states that disclosure of the confidential and commercial proprietary data of California cellular carriers, as well as information which is part of the California Attorney General's investigation, on any basis, would cause competitive harm and raise significant antitrust concerns.[73]

27. The CPUC states that the AG Excerpts are relevant, material, and essential to the California petition.[74] It also asserts that claims that CPUC violated state law in submitting to the FCC information under seal obtained from the Attorney General, and information obtained from cellular carrier proceedings are baseless since CPUC has not publicly disclosed any information provided to it under seal. The CPUC argues that disclosure to the FCC does not constitute public disclosure. The CPUC contends that its only duty is to uphold the public interest and protect California consumers from paying unjust and unreasonable rates for cellular service.[75]

### 3. Discussion

28. It is unnecessary for us to determine whether state law may have been infringed or violated for purposes of conducting these federal proceedings, as alleged by some of the parties. While LACTC contends that even protected disclosure of the AG Excerpts outside the California proceeding is improper without provision for "proper rebuttal," the protective order and related procedural decisions in this Order will enable LACTC and all parties to review and comment on the materials. We need not address the applicability of Section 0.457(g) asserted by LACTC because California did not request confidential treatment under this Rule, the California Attorney General consented to the CPUC submission of this material, the material was previously released pursuant to a protective order in the state proceeding, and we have discretion to disclose data.

29. The CPUC re-submission also includes an affidavit from Ellen S. LeVine, the CPUC attorney responsible for preparing the California petition. The LeVine affidavit describes her staff's review and copying of internal documents that were first obtained by the Attorney General from two facilities-based cellular carriers as part of its antitrust investigation. The affidavit is accompanied by copies of the documents from which the Excerpts in the petition were taken. This material establishes the authenticity of the documents. The AG Excerpts have not been characterized by the CPUC petition as constituting evidence of anticompetitive abuse, and California explicitly states that the materials do not allege anticompetitive behavior.[76] Thus, the affidavit requirement of Section 20.13 of the Commission's Rules does not apply to the AG materials. We next consider the treatment to be accorded these materials.

30. There is no dispute as to the possibility of substantial competitive harm from public disclosure of the statements contained in the unredacted petition that rely on AG Excerpts. The quotations are excerpted from internal company marketing documents that disclose the companies' various contemplated responses to present and anticipated competition, including specific marketing initiatives. The CCAC contends, as noted, that information from the Attorney General's investigation could be exploited by a competitor to suggest that a carrier is involved in unlawful conduct. At the same time, however, there is a strong benefit of having these materials considered by the parties to this proceeding in commenting on California's petition. The pricing and marketing behavior of facilities-based cellular carriers is directly relevant to the required statutory determination whether market conditions in California adequately protect subscribers from unreasonable rates. Without suggesting our view on the merits, or the weight to be accorded these materials, we find that these materials are logical and relevant foundations for the factual demonstration CPUC seeks to make, and so could constitute a relevant component of the factual basis leading to the Commission's ultimate decision on the merits.

31. As described in the *First Confidentiality Order*, the finding that substantial competitive harm from unrestricted disclosure is probable does not lead to automatic withholding of these materials. We then must determine whether the public interest in disclosure is sufficiently compelling to outweigh the risk of competitive harm.[77] In this instance, disclosure of the marketing and pricing practices of facilities-based cellular operators could be competitively harmful. That information, however, is directly relevant to the required statutory determination, and so is of "critical significance" for the determination of whether the Commission should extend intrastate rate authority to CPUC.[78] As we explained in the *First Confidentiality Order*, "the public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds."[79] At the same time, we reject CCAC's argument that the possible use of such materials by competitors to suggest improper or unlawful practices is a cognizable concern for purposes of our confidentiality determination. Such usage of materials does not come within the purview of competitive harm as contemplated by Exemption 4.[80] In these circumstances, limit-

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[72] McCaw Comments on Draft Protective Agreement, at 2-3.
[73] US West Comments on Draft Protective Agreement, at 2.
[74] CPUC Comments on Draft Protective Agreement, at 1-2, 8-9.
[75] *Id.* at 5-7.
[76] California Petition for Clarification, Jan.27, 1995, at 4.
[77] *First Confidentiality Order* at paras. 27-28. We note that the Commission has authority under Sections 0.457(d)(1) and (d)(2)(i) of our Rules, 47 C.F.R. § 0.457(d)(1) & (d)(2)(i), to disclose trade secrets and commercial or financial information obtained from any person and privileged or confidential, even though that data falls within the purview of Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). Chrysler v. Brown, 441 U.S. 281, 290-294 (1979). Under the Trade Secrets Act, 18 U.S.C. § 1905, an agency's decision to release such data must be "authorized by law." *See Chrysler*, 441 U.S. at 294-316. Commission rules permitting disclosure of Exemption 4 materials upon a "persuasive showing" constitute the authorization required. 47 C.F.R. § 0.457(d)(1) & (d)(2)(i). *See* Letter to Jonathan E. Canis, Swidler & Berlin from Kathleen M. H. Wallman, FCC, 9 FCC Rcd 6495, 6495-96 (1994) (Wallman Letter).
[78] *See* AT&T, FOIA Control No. 88-190 (Com. Car. Bur. Nov. 23, 1988). *See also* Robert J. Butler, 6 FCC Rcd 5414, 5418 (1991).
[79] *First Confidentiality Order* at para. 27.
[80] *See* Silverberg v. HHS, 1991 WL 633740, slip op. at 10 (D.D.C. June 14, 1991) (not reported in F. Supp.) (possibility

ed disclosure of the AG Excerpts to the parties to this proceeding, pursuant to a protective order, appropriately balances the competing concerns and is consistent with the Commission's policies in prior decisions.[81]

32. For purposes of PR Docket No. 94-105 and the Protective Order attached to the *First Confidentiality Order* as Appendix A, therefore, Confidential Information as described in para. 34 of that Order is expanded to include (i) the references to internal company documents on pages 42, 45, and 75 of the unredacted CPUC Petition submitted February 2, 1995, and (ii) the affidavit submitted February 2, 1995 by Ellen LeVine, and internal company documents attached to that affidavit for authentication.

33. The Bureau has also reviewed the re-submitted California appendices for compliance with terms of the *First Confidentiality Order*, and finds the materials categorized in that Order as Group A and Group B have been included in the unredacted materials to the extent specified by that Order, and that the Group C materials from Appendix J (the subscriber counts for individual rate discount plans) have been expunged from the unredacted materials as specified.

34. Because this Order has deferred effectiveness with respect to the AG Excerpts, Commission staff will mask the references to AG Excerpts in the unredacted CPUC petition to enable immediate review of the petition. When the Order becomes effective regarding protected disclosure of the AG Excerpts, an unmasked (*i.e.*, wholly unredacted) version of the petition will be made available to parties who have filed an executed protective order with the Secretary.

## III. HAUSMAN AFFIDAVIT

35. The *First Confidentiality Order* required that AirTouch and CTIA provide the underlying data used to conduct Jerry Hausman's (Hausman) analysis, and a request for confidential treatment as appropriate, if they wish the Commission to consider Hausman's analysis in its substantive review of the petition.[82] AirTouch responded on January 27, 1995, noting that it had previously supplied that underlying data.[83] CTIA submitted comments January 30, 1995, asserting that it has neither custody nor control of the raw data relied on by Hausman to prepare his supporting affidavit for CTIA, and cannot obtain the consent of individual carriers who submitted their data to Hausman on the premise of confidential treatment in the short filing window provided.[84] CTIA avers there is no basis for the Commission's decision to exclude the Hausman affidavit "even without access to the underlying data," asserting that the Commission has not hesitated in other matters to rely on aggregated analyses of raw data, and that the CPUC and other parties have access to the relevant data for California markets at issue here, and to the sources identified by Dr. Hausman as the basis of his other data.[85]

36. In its Reply to the CTIA Comments, submitted February 2, 1995, California argues that it should not be made to guess at assumptions and data underlying Hausman's results placed in the record by CTIA, because the reliability and accuracy of Hausman's analysis might be questioned or disproved by third-party review.[86] The generally available data elements cited in the CTIA comments, California states, are meaningless without knowledge of how Hausman combined it with other data that he relied on which CTIA refuses to provide. While CTIA "selectively cites" to some of Hausman's source data, California asserts, it does not indicate which data was used, which rejected, and whether the data used was adjusted in any way.[87] In addition, CPUC notes that Hausman relied on national data, while CPUC has access only to state data, and in any case CPUC cannot determine if it possesses the data relied on by Hausman until that data is identified.

37. The Commission has in other circumstances required that underlying confidential materials provided by third parties be disclosed, subject to protected disclosure arrangements, when necessary to determine the reliability of data submitted to the Commission. For example, in the *SCIS Disclosure Order*,[88] the staff of the Common Carrier Bureau first examined proprietary computer models on a limited, *in camera* basis, and then, having confirmed the "presence and importance of multiple decision points and data elements" in that aspect of the cost development process for Open Network Architecture rate elements, concluded that some ability to examine the effects of those models' variables when developing unit investment was necessary "to undertake reasoned analysis of an individual carrier's rates and the differences between individual carriers."[89] The Bureau then required that parties be afforded an opportunity

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that competitors might "distort" requested information and thus cause submitter embarrassment insufficient for showing of competitive harm); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) ("fear of litigation" insufficient for showing of competitive harm), *aff'd in part & rev'd in part on other grounds*, 829 F.2d 182 (D.C. Cir. 1987).

[81] *See Wallman Letter, supra* note 78. *See also* Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526, 1533 (Com. Car. Bur. 1992), *aff'd*, Order, 9 FCC Rcd 180 (1993); Memorandum Opinion and Order, In the Matter of Motorola Satellite Communications, Inc. Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band, ET Docket No. 92-28 PP-32, FOIA Control Nos. 92-83, 92-88, 92-86, 7 FCC Rcd 5062 n.7 (1992).

[82] *First Confidentiality Order* at para. 38. We take this opportunity to correct a typographic error in that text; references therein to Section 0.549 of the Commission's Rules should refer to Section 0.459.

[83] AirTouch noted the supporting materials were provided, pursuant to a confidentiality agreement, to CPUC on Sept. 30, 1994, and that the Hausman affidavit attached to AirTouch comments was not the subject of California's Motion to Strike dated Oct. 7, 1994.

[84] CTIA Comments in Response to Commission's January 25, 1995 Order, at 1-2.o

[85] *Id.* at 3-4.

[86] CPUC Reply at 2-3.

[87] *Id.* at 3-4.

[88] *See* Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992), *affirmed* Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, 9 FCC Rcd 180 (1993)(*SCIS Disclosure Review Order*). *See also* Open Network Architecture Tariffs of Bell Operating Companies, Order Terminating Investigation, 9 FCC Rcd 440 (1993) (*ONA Investigation Final Order*).

[89] *SCIS Disclosure Order*, 7 FCC Rcd at 1534-35 (paras. 42, 48).

to examine and operate the actual software program, and separately referred aspects of the carriers' ONA rate development process to an independent auditor for review.

38. While the raw data and calculations involved here are notably less complex, they are essential to understanding the basis for Hausman's assertions. Without providing these data to petitioner and to Commission staff, the Commission cannot consider those assertions. The burdens of obtaining permission from carriers or other parties supplying data are inherent in the kind of study Hausman undertook. The interposition of a trade association cannot serve to reduce or eliminate the obligation of the actual parties in interest to substantiate their contentions as required. The Bureau therefore affirms its determination in the *First Confidentiality Order* and the Hausman affidavit in support of the CTIA Opposition to California's petition will not be considered.

## IV. PROCEDURES FOR OBTAINING ACCESS TO MATERIALS UNDER TERMS OF PROTECTIVE ORDER

39. Parties to PR Docket Nos. 94-105 and 94-106 who seek to inspect confidential materials are required, as explained in the *First Confidentiality Order*, to file an executed copy of the appropriate declaration (for the Protective Order provided as Appendix A to the *First Confidentiality Order)* or protective order itself (for the Protective Order provided for use in PR Docket No. 94-106, as Appendix B to the *First Confidentiality Order)* with the Secretary of the Commission, and are hereby requested to file a courtesy copy with the Chief, Policy Division, Wireless Telecommunications Bureau. Parties are encouraged, in the interest of expedition, to obtain confidential materials directly from petitioners, provided that the executed protective order is on file with the Secretary of this Commission, when that procedure is more convenient. Parties needing to review confidential materials on file at the Commission should contact the Policy Division, Wireless Telecommunications Bureau.

40. *Connecticut.* This Order is effective February 17, 1995 with respect to the confidential materials submitted by Connecticut on January 20, 1995, and determined, *supra* paras. 7-13, 16, to warrant disclosure subject to protective order. This deferred effectiveness provides Connecticut an opportunity to apply for review of the staff determination respecting treatment of these materials. *See* Section 0.459(g) of the Commission's Rules.[90]

41. *California.* This Order is immediately effective with respect to the confidential materials submitted by California on February 2, 1995, other than the AG Excerpts, and is effective with respect to the AG Excerpts February 17, 1995. This deferred effectiveness provides parties to that proceeding an opportunity to apply for review of the staff determination respecting treatment of these materials. *See* Section 0.459(g) of the Commission's Rules.[91] Because this Order defers effectiveness with respect to the AG Excerpts, Commission staff will mask the references to AG Excerpts in the unredacted petition to enable immediate review of the petition. When the Order becomes effective regarding protected disclosure of the AG Excerpts, an unmasked version of the petition will be made available to parties who have filed an executed protective order with the Secretary.

42. Comments on all the confidential materials considered in this Order are due no later than February 24, 1995, and replies are due no later than March 3, 1995. In the event that an application for review or other filing requires the Bureau to stay the effect of its decision in PR Docket No. 94-105, providing for protected disclosure of the AG Excerpts, or its decision in PR Docket No. 94-106, providing for protected disclosure of certain materials submitted by Connecticut on January 20, 1995, this schedule for comments and replies will be maintained for all other elements of the California and Connecticut petitions disclosed under protective orders, and a subsequent Order will establish a separate schedule for comments and replies on materials subject to application for review or other challenge.

## V. ORDERING CLAUSES

43. Accordingly, pursuant to Section 0.459(d) of the Commission's Rules, IT IS ORDERED that the Motion to Accept Supplemental Pleading and the Request for Confidential Treatment filed by the state of Connecticut IS GRANTED IN PARTand IS DENIED IN PART as described in paragraphs 7-16.

44. IT IS FURTHER ORDERED that, pursuant to Section 0.459(d) of the Commission's Rules, the Request for Proprietary Treatment of Documents Used in Connection with Petition to Retain Regulatory Oversight of Cellular Service Rates in California, filed by the state of California on February 2, 1995, IS GRANTED as described in paragraphs 31-34.

45. Parties to PR Docket No. 94-105 who seek to inspect the unredacted version of the California petition and related Appendices filed with the Commission February 2, 1995 may obtain those documents by filing an executed copy of the Protective Order attached to the *First Confidentiality Order* as Appendix A with the Secretary of this Commission. After the executed Protective Order is filed with the Secretary, parties may obtain confidential information from the California Public Utilities Commission or from the Policy Division, Wireless Telecommunications Bureau. For this purpose, Confidential Information shall consist of those materials described in paragraph 34 of the *First Confidentiality Order* and the additional materials described in paragraph 32-34.

46. Parties to PR Docket No. 94-106 who seek to inspect the materials filed by Connecticut on January 20, 1995 may obtain those documents after February 16, 1995, assuming no application for review or stay request has been submitted, by filing an executed copy of the Protective Order attached to the *First Confidentiality Order* as Appendix B with the Secretary of this Commission. After the executed Protective Order is filed with the Secretary, parties may obtain confidential information from the Connecticut Department of Public Utility Control or from the Policy Division, Wireless Telecommunications Bureau. For

[90] 47 C.F.R. § 0.459(g).
[91] *Id.*

this purpose, Confidential Information shall consist of those materials listed in Section 2 of Appendix A of this Order.

47. IT IS FURTHER ORDERED that parties in PR Docket No. 94-105 who elect to inspect the confidential materials submitted by the California Public Utilities Commission on February 2, 1995, and parties in PR Docket No. 94-106 who elect to inspect the confidential materials submitted January 20, 1995 by the Connecticut Department of Public Utility Control, SHALL FILE comments on those materials no later than **February 24, 1995**, and SHALL FILE reply comments no later than **March 3, 1995**.

48. IT IS FURTHER ORDERED that, if confidentiality determinations made in PR Docket Nos. 94-105 or 94-106 by this Order are subject to application for review or other challenge prior to February 17, 1995, parties SHALL FILE comments on confidential materials not subject to challenge on the schedule specified in paragraph 42.

49. This Order is issued under delegated authority and, in order to meet the statutory deadline set forth in Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. 332(c)(3)(B), is effective upon adoption except as noted *supra* paras. 40-42. Parties to PR Docket Nos. 94-105 or 94-106 may, no later than February 16, file an application for review by the Commission of the confidentiality determinations made herein. *See* Section 459(g) of the Commission's Rules, 47 C.F.R. § 0.459(g).

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Attachments

## Appendix A

Description of items submitted by Connecticut on January 20, 1995 with the state's request for confidential treatment.

### SECTION 1 -- CONNECTICUT MATERIALS THAT WILL BE PUBLICLY DISCLOSED.

**a. Application**
Request to Establish a New Docket on DPUC's Own Motion

**b. Administrative**
Docket Assignments and Schedules

**c. Correspondence**
Testimony of Jan Mizeski, Director of Management and Billing Systems, Escotel Cellular Inc. and The Phone Extension, Inc.

Testimony of Gary Schulman on behalf of Bell Atlantic Systems, Inc.

Objection to Late-Filed Responses of the Cellular Carriers, and Motion to Compel Disclosure of Additionally Requested Financial Information

Connecticut Department of Public Utility Control Reply to Opposition Comments of the Wholesale Cellular Providers

DPUC Investigation into the Connecticut Cellular Service Market and the Status of Competition Protective Order

**d. Motions**
Petition of the Attorney General State of Connecticut to Intervene

Objection to Responses to Interrogatories of the Cellular Carriers, Motion to Deny

Requests For Protective Orders and Motion to Compel Disclosure of Financial Information and Objection to Metro Mobile Requests for Late Filing of Expert Testimony and Motion to Deny Admission of Late-Filed Expert Testimony

**e. Notice of Hearings, Meetings, and Minutes**

**f. Secretary Returns**

DPUC Investigation Into the Connecticut Cellular Service Market and the Status of Competition Draft Decision and Final Decision

**g. Briefs**

Litchfield Acquisition Corporation's Memorandum Opposing the Filing of a Petition with the Federal Communications Commission For Retention of Authority to Regulate Cellular Wholesale Rates

Brief of Metro Mobile Cts of Hartford, Inc. , Metro Mobile Cts of New Haven, Inc., Metro Mobile Cts of Fairfield County, Inc., Metro Mobile Cts of Windham, Inc. and Metro Mobile of New London, Inc.

**h. Reply Briefs**

Litchfield Acquisition's Reply Brief

Reply Brief of the Office of Consumer Counsel

Reply Brief of the Attorney General

Reply Brief of Springwich Cellular Limited Partnership (Erratum to Reply Brief)

Reply of the Attorney General of the State of Connecticut

**i. Late-Filed Exhibits**

LFE-11 Submitted by NCRA
NCRA LRE 10 & 11
Document 7 Changing Channels: Voluntary Reallocation of UHF Television Spectrum

Document 8 Memo of U.S. in Opposition to AT&T's Motion for a Waiver of Section 1(D) of the Decree in Connection w/its Acquisition of McCaw

Escotel Submission of Late File Exhibits Nos. 22, 23, 26, and 27

Springwich LFE No. 21 FCC's Broadband PCS Decision

**j. Video**

**k. DPUC Decision**

l. Exceptions/Comments

Litchfield Exceptions to the Draft Findings and Statement Regarding Desire for Oral Argument

Written Exceptions and Notification of Intent to Make Oral Argument of Metro Mobile

Atty General of Connecticut Comments

Office of Consumer Counsel's Comments

Exceptions of Springwich Cellular

DPUC Investigation Into The CT Cellular Service Market and the Status of Competition

pp. 1-139
" 372-653
" 654-908
" 909-1180
" 1181-1190
" 1430-1439
" 1608-1615
" 1617-1732
" 1733-1783

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SECTION 2 -- MATERIALS THAT WILL BE DISCLOSED SUBJECT TO THE PROTECTIVE ORDER IN APPENDIX B OF THE *FIRST CONFIDENTIALITY ORDER*.

a. Late filed exhibit No. 3, Attachment A; dated May 27, 1994
Springwich's five-year projection of cellular numbers.

Late filed exhibit No. 4, Attachment A; dated May 27, 1994
Springwich's long-run incremental analysis cost study and forecast assumptions

Late filed exhibit No. 7, Attachment A; dated May 27, 1994
Springwich's analysis showing actual subscribers vs. theoretical switch capacity.

Late filed exhibit No. 9, Attachment A; dated May 27, 1994
Copy of Springwich Cellular Limited Partnership Agreement

b. Response to request No. TE-3, Attachment A; dated May 6, 1994
Springwich's wholesale financial statements and annual cost and revenue data

**Response to request** No. TE-5, Attachment A; **dated May 6, 1994**
Springwich's cellular end-user churn data

**Response to request** No. TE-6, Attachment A; **dated May 6, 1994**
Springwich's monthly average minutes of use per wholesale subscriber, from 1985 - present.

**c. Response to request** No. TE-6, **dated April 18, 1994**
Bell Atlantic Metro Mobile: Average Usage Per month - Connecticut only

**d. Late filed Exhibit** No. 34, Attachment A; **dated June 16, 1994**
Springwich forecasted revenue calculations

**e. Late filed Exhibit** No. 2, Attachment A; **revised June 6, 1994**
Springwich: planned operating revenues, operating expenses, net operating income, partners' equity, and distributions to partners, for 1991, 1992, and 1993; Springwich Partnership: detailed revenues, operating income and operating expenses, for 1991, 1992, and 1993; Springwich's financial projections.

**Late filed Exhibit** No. 3, Attachments A & B; **revised June 6, 1994**
Springwich's five year projection of its cellular service market share and subscriber base, given various hypothetical marketplace actions by competitors.

**Late filed Exhibit** No. 28, Attachments A, B, & C; **revised June 6, 1994**
Springwich's list of charges from affiliates, description of charges from affiliates, method of allocation, detail of charges from affiliates to Springwich, and Springwich's detailed operating expenses.

**f. Response To TE-6,** date May 18, 1994
Litchfield's monthly average of minutes of use per wholesale subscriber, from Jan. 1992 to April 1994. (Excepting from confidential treatment in any form, however, associated responses to TE-1 and TE-2, describing Litchfield's offering since 1991 and attaching wholesale tariff with 1991 rates, unchanged since.)

**Exhibit B, May 18,** 1994
Litchfield's financial statements.

**g. Litchfield's responses** to Interrogatories TE-1 through TE-18, **filed under letter dated May 5, 1994, received** May 6, 1994 by DPUC, including, ***inter alia***:
Response to TE-3: appending financial reports for the years ending Jan. 31, 1991 and Jan. 31, 1992 as Appendices B and C (B was in fact later filed under letter dated May 18, 1994), including balance sheets showing assets and liabilities, operating expenses and losses, cash flows and increase in cash.

**h. Late-filed Exhibit** 15, **dated May 27, 1994**

Bell Atlantic Metro Mobile's statement of wholesale operations' revenues and expenses

Late-filed Exhibit 16, dated May 27, 1994

Late filed Exhibit 17, dated May 27, 1994

Bell Atlantic Metro Mobile's statements of wholesale operations' assets and liabilities and wholesale operations'revenues and expenses.

i. Brief of the Attorney General of Connecticut

## SECTION 3 -- CONNECTICUT MATERIALS THAT WILL BE DELETED FROM THE COMMISSION FILES AND WILL NOT BE CONSIDERED IN THE COMMISSION'S DECISION ON THE MERITS.

a. Cellular Resellers Coalition Brief

b. Confidential Hearing of the DPUC Investigation pp. 1373-1429
In camera session for Bell Atlantic

c. Brief of the Office of Consumer Counsel

d. Confidential Hearing of the DPUC Investigation pp. 1440-1545- Testimony

e. Confidential Hearing of the DPUC Investigation pp. 1580-1607- Testimony

f. Initial Brief of Springwich Cellular Limited Partnership

g. Confidential Hearing of the DPUC Investigation pp. 1194-1372- Testimony

h. Confidential Hearing of the DPUC Investigation pp. 1546-1579- Testimony

i. Late-filed Ex. 29, dated June 7, 1994
1993 Unaudited MetroMobile monthly revenues, estimated expense allocation. (Item is not specifically mentioned either in the protective order or in the DPUC's Jan. 9, letter requesting confidential treatment.)

j. Late-filed Ex. 16, dated May 27, 1994, revised June 3, 1994
Connecticut Wholesale Cellular report documenting revenue, expense and subscriber information. (Item is not specifically mentioned either in the protective order or in The DPUC's Jan. 9, letter requesting confidential treatment.)

## APPENDIX B

**Parties Whose Pleadings**
**in PR Docket Nos. 94-105 or 94-106**
**are Referenced in Second Confidential Treatment Order**

California
PR Docket No. 94-105

Airtouch Communications (Airtouch)
California Public Utilities Commission (California or CPUC)
Cellular Carriers Association of California (CCAC)
Cellular Telecommunications Industry Association (CTIA)
Los Angeles Cellular Telephone Co. (L.A. Cellular)
McCaw Cellular Communications, Inc. (McCaw)
US West Cellular of California (US West)

Connecticut
PR Docket No. 94-106

Connecticut Department of Public Utility Control (Connecticut or DPUC)

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI CABLEVISION OF
THE HEARTLANDS, INC.

Appeal of Local
Rate Order of City of
Dallas Center, Iowa

**ORDER**

**Adopted: February 9, 1995; Released: February 10, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On June 9, 1994, TCI Cablevision of the Heartlands, Inc. ("TCI"), filed an Appeal of Local Cable Rate Order, adopted on May 10, 1994 by its local franchising authority, the City of Dallas Center, Iowa ("the City"). The City opposes TCI's appeal.[1] The Rate Order established a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[2] Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers for overcharges levied for the time period from September 1, 1993 to May 10, 1994, the effective date of the local order.

2. In its review of TCI's Form 393, the City reduced TCI's rates for its basic service tier to the maximum permitted rate, but ordered TCI to keep its rates for equipment and installation at the current levels, rather than at the higher, maximum permitted levels.[3] TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly reduced TCI's regulated revenues by setting its rates for equipment and installation below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. TCI argues that it should be permitted to offset its refund liability for its basic service tier rate with its undercharges for equipment and installation rates. TCI also contends that the City improperly ordered it to return overcharges directly to those subscribers who were overcharged rather than allowing TCI to choose which refund method to utilize. We consider each of these issues in turn.

## II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

### A. Refund Offsets

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installation were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[9] After calculating actual aggregate revenues, the operator converts

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[1] The City filed its opposition on June 27, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] TCI's current rate of $9.86 for its basic service tier was reduced to the maximum permitted rate of $9.79. On the Cover Sheet (Part I) of its Form 393, TCI's actual rates for all regulated equipment and installations are below the maximum permitted rates, except that the charge for "upgrade/downgrade (addressable)" is the same for both rates. The City set TCI's rates for equipment and installations at the lower, actual rate rather than the higher, maximum permitted rate.

[4] *See* 47 C.F.R. § 76.944 (1993).

[5] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Third Order on Reconsideration in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[9] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[10] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[11]

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[12] In this proceeding, unless the City disputes either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form, the City should allow TCI to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[13] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[14] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[15] For instance, in this case, the City may not order TCI to set its equipment and installation rates below maximum permitted levels. Further, the City must offset or reduce any refunds it may order by the difference between the actual equipment and installation rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[16] According to TCI, the City has directed TCI to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can reconsider its ruling in a manner consistent with our findings.[17]

### B. Refund Method

9. TCI next contends that the City improperly ordered it to issue refunds directly to those subscribers who were overcharged, rather than allowing TCI to issue a billing credit to the class of subscribers that was charged the unreasonable rate.

10. Our rules provide cable operators facing refund liability with two options. An operator may either return overcharges to those subscribers who actually paid them or it may issue a billing credit to that class of subscribers (i.e., basic tier subscribers) who paid the overcharges.[18] As TCI correctly argues, our rules give the operator the discretion to choose which of the two methods to utilize when issuing refunds. The local franchising authority has no discretion to specify a refund method contrary to the one the operator may choose. This issue is therefore remanded to the City for further proceedings consistent with this order.

## III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that TCI's appeal of the City of Dallas Center's local Rate Order IS REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

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[10] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[11] If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installation at levels below actual cost.

[12] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[13] *See* 47 C.F.R. § 76.942 (1993).

[14] *See Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[15] *See Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

[16] *See Third Recon. Order*, 9 FCC Rcd at 4353.

[17] *See* TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY), DA 94-1479 (Cable Services Bureau, released December 14, 1994).

[18] 47 C.F.R. § 76.942(d) (1993) ("The cable operator, in its discretion, may implement a refund in [either of the two following methods]. ...").

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AmericaTel Corporation — File No. I-T-C-94-321

Application for authorization pursuant to Section 214 of the Communications Act of 1934, as amended, to supplement existing facilities between the U.S. and various foreign countries

**ORDER AND AUTHORIZATION**

**Adopted: December 28, 1994; Released: February 15, 1995**

By the Commission:

1. The Commission has under consideration the above-captioned application, filed by AmericaTel Corporation (AmericaTel) pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, for authority to supplement its existing authorized facilities between the United States and the countries specified in the Appendix hereto for the provision of its authorized services, including switched voice, private line, facsimile, high speed data, and video teleconferencing.[1] AT&T Corporation (AT&T) filed a petition to deny the application, which it subsequently withdrew.[2]

2. AmericaTel has previously been granted authority to provide satellite-based services between the United States and all of the countries listed in the attached Appendix.[3] In the instant application, AmericaTel requests authority to acquire circuits from Pan American Satellite (PAS) in order: (1) to provide service to certain countries for which AmericaTel lacks Section 214 authority to use PAS capacity; and (2) to expand its capacity to serve other specified countries that AmericaTel is currently authorized to serve via PAS. AmericaTel states that, although it has authority to use the INTELSAT system for service to these countries, use of the PAS system is necessary because: 1) some of AmericaTel's foreign correspondents have capacity available on the PAS system which they wish to operate with AmericaTel; and 2) PAS capacity, particularly to certain Latin American countries, is the only available international satellite capacity due to a shortage of INTELSAT capacity.

3. Specifically, AmericaTel requests authority to acquire up to 2.048 Mbps of PAS capacity to some of the countries listed in the Appendix, and up to 1.554 Mbps of capacity to other specified locations. In addition, AmericaTel requests authority to lease capacity from earth station operators in Florida and terrestrial circuits from those earth stations in order to connect those locations with AmericaTel's operating center in Miami, Florida. The international earth station capacity operating with PAS space segment will be leased from authorized international earth station licensees.

4. In a *Memorandum Opinion, Order, Authorization and Certificate* adopted June 28, 1994, we authorized ENTEL International B.V.I. Corporation (ENTEL) to acquire control of AmericaTel. ENTEL is a wholly-owned subsidiary of ENTEL-Chile, a Chilean domestic and international long distance carrier.[4] The primary issue presented in the *AmericaTel Order* was whether the public interest would be served by approving ENTEL's acquisition of AmericaTel. Our public interest analysis in the *AmericaTel Order* focused mainly on the issue of whether AmericaTel's foreign carrier affiliation made it possible for AmericaTel to obtain an unfair competitive advantage that could cause harm to other U.S. carriers.

5. We granted the application because we believed that the balance of public interest considerations, including the application's effect on economic development in the United States and increasing access to foreign telecommunications markets for U.S. companies, supports the grant of this application. We found that Chile's markets for domestic long distance and international services are becoming more competitive and open to U.S. investment and participation. Further, Chile's recent initiatives to liberalize its telecommunication laws and regulations appeared to be designed to promote competition and prevent the abuse of market power. We believed that the nondiscrimination safeguards provided by Chile's regulatory regime and the safeguards we imposed in that order would be sufficient to protect U.S. carriers in their provision of U.S. international service to Chile.[5]

6. Now that the acquisition of AmericaTel is complete, the crucial question to be addressed in our review of this application for additional facilities is whether the authority requested by AmericaTel poses an additional risk of anticompetitive effects and, if so, whether the safeguards we have in effect are sufficient to protect against that risk.[6] Un-

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[1] At the time AmericaTel filed the instant application, ENTEL International B.V.I. Corporation (ENTEL) owned 49 percent of AmericaTel and had agreed with AmericaTel to acquire an additional 31 percent. *See* File No. I-T-C-93-160-TC (application to transfer control of AmericaTel from Northland Communications, Inc. to ENTEL). ENTEL is wholly-owned by ENTEL-Chile, a Chilean domestic and international long distance carrier. The Commission on June 28, 1994 granted AmericaTel's application to transfer control to ENTEL. *See AmericaTel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd 3993 (1994) (*AmericaTel Order*). *See also infra* para. 4.

[2] *See* Letter from Robert E. Conn, Attorney for AmericaTel, to William F. Caton, Acting Secretary, FCC, dated August 12, 1994 (agreement to withdraw petition to deny, signed by Stephen C. Garavito, Attorney for AT&T Corp.). AT&T withdrew its petition to deny in light of the Commission's action in the *AmericaTel Order*, *supra* note 1.

[3] *AmericaTel Corporation*, 7 FCC Rcd 6610 (1992) (authorizing use of the INTELSAT, PAS-1 and Columbia satellite systems).

[4] *See* note 1, *supra*.

[5] *AmericaTel Order*, *supra* note 1, at para. 7.

[6] *See Telefonica Larga Distancia de Puerto Rico, Inc.* , FCC 94-197, released August 8, 1994, at para. 14 (*TLD*) (granting TLD additional facilities on unaffiliated routes).

der this standard, we conclude that the public interest would be served by granting the instant application. Authorization of the requested facilities does not pose any new potential opportunities for discrimination or unfair competition by AmericaTel not already addressed by the safeguards imposed in the *AmericaTel Order*. AmericaTel has not requested authority either to provide any new services to, or to serve on a direct facilities basis, any new affiliated countries. Thus, grant of the application is unlikely to serve as a vehicle for market abuse or anticompetitive conduct. [7] All conditions included in the *AmericaTel Order* have been included in this order.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-94-321 IS GRANTED and AmericaTel is authorized to:

a. lease from PAS and operate the satellite capacity specified in Appendix A between appropriately licensed earth stations in the United States and the PAS-1 satellite connecting with similar facilities between the satellite and earth stations in the countries listed in Appendix A furnished by AmericaTel's correspondents in those countries;

b. lease capacity in U.S. earth stations authorized to communicate with the PAS-1 satellite;

c. lease necessary domestic connecting facilities; and

d. use the facilities set forth in the foregoing subparagraphs a., b. and c. to provide its authorized services, including private line and public switched services, subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems.

8. IT IS FURTHER ORDERED that our authorization of AmericaTel to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the United States and the points listed in Appendix A -- that is, private lines which originate in the United States and terminate in the points listed in Appendix A or which originate in the points listed in Appendix A and terminate in the United States. In addition, AmericaTel may not -- and its tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. end or the points listed in Appendix A, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the points listed in Appendix A afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991); *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending*.

9. IT IS FURTHER ORDERED that neither AmericaTel nor any persons or companies directly or indirectly controlling or controlled by AmericaTel, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which AmericaTel or any persons or companies controlling or controlled by AmericaTel are parties.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS-1 satellite.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to the limitations specified under the separate systems policy, applicable consultations under Article XIV(d) of the INTELSAT Agreement and PAS's determination whether such capacity can be offered in light of these limitations.

12. IT IS FURTHER ORDERED that AmericaTel shall not agree to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any country.

13. IT IS FURTHER ORDERED that AmericaTel shall not route traffic to or from third countries for which it does not have authorization under Section 214 of the Communications Act, as amended, 47 U.S.C. § 214.

14. IT IS FURTHER ORDERED that AmericaTel shall not bargain for nor agree to accept more than its proportionate share of return traffic from any country.

15. IT IS FURTHER ORDERED that AmericaTel shall settle its international accounts in accordance with the nondiscriminatory accounting rates it is required to file with this Commission.

16. IT IS FURTHER ORDERED that AmericaTel shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates.

17. IT IS FURTHER ORDERED that AmericaTel shall file with the Commission within 30 days of their execution copies of any operating agreements which it enters into with its foreign correspondents; and that it shall also file with the Commission within 30 days of their execution copies of any operating agreements entered into by its parent/affiliates that affect traffic or revenue flows between the United States and Chile; and that it shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

18. IT IS FURTHER ORDERED that AmericaTel shall seek, pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, additional authorization under Section

[7] The instant authorization includes additional facilities on AmericaTel's affiliated route (U.S.-Chile). AmericaTel indicates that substantial progress has been achieved in addressing concerns raised by the Commission in the *AmericaTel Order*. According to AmericaTel's "initial progress report," all regions of Chile are now served by the newly-instituted multicarrier dialing system; and Telefonica de Espana has publicly announced it has sold its shares of ENTEL-Chile stock to Chemical Bank (and Chemical Bank, in turn, has announced that it has sold these shares to Samsung Corporation (of Korea) and Chilquinta, S.A. (of Chile)). *See* Letter from Raul R. Rodriguez, Counsel to AmericaTel Corporation, to William F. Caton, Acting Secretary, FCC, dated October 31, 1994.

214 of the Communications Act, 47 U.S.C. § 214, before adding or deleting circuits between the United States and Chile or before otherwise using its authorized circuits between the United States and Chile in a manner other than as specified in its Section 214 authorizations.

19. IT IS FURTHER ORDERED that AmericaTel shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and Chile that AmericaTel is authorized to provide within 90 days from the end of each calendar quarter.

20. IT IS FURTHER ORDERED that AmericaTel shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this Order. In addition, AmericaTel shall file cost support for its tariff rates between the United States and Chile.

21. IT IS FURTHER ORDERED that AmericaTel shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

22. IT IS FURTHER ORDERED that AmericaTel shall file progress reports no later than October 31 of each year between 1994 and 1998. These reports shall contain the information specified in paragraph 37 of the Commission's Memorandum Opinion, Order, Authorization and Certificate, 9 FCC Rcd 3993 (1994).

23. IT IS FURTHER ORDERED that so long as Telefonica de Espana S.A. (Telefonica) has an ownership interest in ENTEL-Chile, AmericaTel shall notify the Commission within seven days of any appointment of any person by ENTEL to the AmericaTel Board that is a representative of either Telefonica or any person or company directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it.

24. IT IS FURTHER ORDERED that the regulatory requirements adopted herein are subject to modification as a result of any action the Commission may take in any relevant future proceeding of general applicability.

25. This order is effective upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**APPENDIX A**

AmericaTel is authorized to lease and operate on the PAS-1 satellite system up to 2.048 Mbps of capacity between the United States and each of the countries marked by a single asterisk (*) and up to 1.544 Mbps of capacity between the United States and the remaining locations for the provision of service between the United States and the countries listed below.

Anguilla
*Argentina
Aruba
Austria
Azerbaijan
*Bahamas
*Barbados
*Belgium
*Bermuda
*Bolivia
*Brazil
*British Virgin Is.
*Cayman Islands
*Chile
*Colombia
*Costa Rica
Czech Republic
Denmark
*Dominican Republic
*Ecuador
*France
*Germany
Greece
*Guatemala
*Haiti
*Honduras
Ireland
*Italy
*Jamaica
Luxembourg
*Mexico
Monaco
Montserrat
*Netherlands
*Neth. Antilles
*Panama
*Paraguay
*Peru
Portugal
Romania
Russian Fed.
*Spain
Sweden
Switzerland
Turks & Caicos Is.
Trinidad and Tobago
*Uruguay
*Venezuela
*United Kingdom
Yugoslavia

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

First Broadcasting Company
(Assignor)

and File No. BAL-940628EH

KGO-AM Radio, Inc. (Assignee)

For Assignment of License of
KSFO(AM), San Francisco, California

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 8, 1995; Released: February 14, 1995**

By the Commission:

1. The Commission has before it the above-captioned application for assignment of license of KSFO(AM), San Francisco, California, from First Broadcasting Company ("First Broadcasting") to KGO-AM Radio, Inc., and a related request for waiver of 47 C.F.R. §73.3555(b), the Commission's one-to-a-market rule.[1] KGO-AM Radio, Inc. is a wholly-owned subsidiary of Capital Cities/ABC, Inc. ("Cap Cities"), which also owns the corporate licensees of KGO(AM) and KGO-TV, both licensed to San Francisco, California.[2] The Commission authorized Cap Cities to retain common ownership of KGO(AM) and KGO-TV in 1989 on the basis of Cap Cities' showing that the San Francisco market satisfied the Commission's criteria for waiver of the one-to-a-market rule. *See Capital Cities/ABC, Inc.*, 4 FCC Rcd 5498 (1989); *see also In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *recon. granted in part and denied in part ("Second Report and Order Recon.")*, 4 FCC Rcd 6489 (1989). Because the Grade A contour of KGO-TV encompasses all of San Francisco, grant of the above-captioned application requires waiver of the one-to-a-market rule.[3]

2. Cap Cities bases its waiver request on the one-to-a-market waiver standards adopted in the *Second Report and Order*. Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination ("top 25 market/30 voice standard"). *See* 47 C.F.R. §73.3555, n.7. It also favors requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time, *e.g.*, four months, or that are involved in bankruptcy proceedings. *Id.* Other waiver requests are evaluated on a more rigorous case-by-case basis, as set forth in the *Second Report and Order*. *Id.* While Cap Cities waiver request meets the top 25 market/30 voice standard,[4] it nevertheless must be reviewed under the case-by-case standard because, as noted, the proposed assignment of license also relies upon the revised local radio ownership limits.[5] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. *See Second Report and Order*, 4 FCC Rcd at 1753-54.

3. In support of its waiver request, Cap Cities submits a showing that addresses each of the five case-by-case factors.[6] Cap Cities first contends that the proposed combination of KSFO(AM) and KGO(AM) will create efficiencies by combining management personnel, as well as news, programming, and production staffs. Cap Cities estimates that staff consolidation will reduce KSFO(AM)'s operating expenses by at least $750,000 per year. Cap Cities contends that additional savings will be realized by consolidating sales offices, equipment sharing, and securing volume discounts

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[1] Section 73.3555(b) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a commonly-owned television station, or, conversely, if the Grade A contour of a television station encompasses the entire community of license of a commonly-owned AM or FM station. *See* 47 C.F.R. §73.3555(b).

[2] Because KGO-AM, Radio, Inc. is a wholly-owned subsidiary of Cap Cities, its proposed ownership interest in KSFO(AM) is attributable to Cap Cities under the Commission's multiple ownership rules. *See* 47 C.F.R. §73.3555, note 2. Cap Cities will hereafter be used to identify KGO-AM, Radio, Inc., as well as the licensees of KGO(AM) and KGO-TV.

[3] Because the principal community contours of KSFO(AM) and KGO(AM) overlap, Cap Cities must also meet the requirements of the radio ownership rule found in Section 73.3555(a) of the Commission's rules. *See* 47 C.F.R. §73.3555(a)(1). Cap Cities demonstrates that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of principal community contour overlap of same service stations KSFO(AM) and KGO(AM) occurs within the San Francisco, California radio metro market, as defined by Arbitron, Inc., Cap Cities supplies audience share data from the most recent Arbitron survey available from that market at the time the instant application was filed. *See* 47 C.F.R. §73.3555(a)(3)(iii). Those data show that the combined audience share of KSFO(AM) and KGO(AM) in the metro market is 8.8 percent, and therefore below the 25 percent audience share limit set forth in the rule. *See* 47 C.F.R. §73.3555(a)(1)(ii).

[4] As set forth in paragraph 8, *infra*, the San Francisco media market is the country's fifth largest and contains 53 separate broadcast "voices."

[5] *See In re Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6394, n.40 (1992); *see also Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993)(consideration of one-to-a-market waivers under the case-by-case standard still appropriate where new radio-TV combinations are created, pending the possible revision of the one-to-a-market rule in the outstanding TV ownership proceeding in MM Docket No. 91-221).

[6] It should be noted that "[n]ot all of the factors will be relevant in every case." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491.

on purchases of supplies and programming services.[7] Cap Cities also maintains that the proposed station combination will allow the consolidation of its San Francisco radio operations at the existing KGO(AM) facility, reducing rent and utility expenses by approximately $213,000 per year. In sum, Cap Cities projects savings of approximately $1.45 million for the KSFO(AM)/KGO(AM) combination. Cap Citiesprojects that savings achieved through joint operation of KSFO(AM) and KGO(AM) will result in public service and programming benefits made possible by enhancements to KSFO(AM)'s public affairs programming. In that connection, Cap Cities notes that it proposes to offer public affairs programming on KSFO(AM) analogous to that offered by KGO(AM), which Cap Cities asserts airs both daily public affairs programming and regular public service announcements.[8] Cap Cities further notes that combining KSFO(AM) with KGO(AM) would enable KSFO(AM) to avail itself of KGO(AM)'s community relations department, which Cap Cities notes has received numerous awards for outstanding public service. With respect to benefits arising from its proposed ownership of KSFO(AM) and KGO-TV, Cap Cities maintains that although it intends to operate KSFO(AM) and KGO-TV separately, KSFO(AM)'s affiliation with KGO-TV will enable KSFO(AM) to avail itself of KGO-TV's experience in the local employment market, particularly KGO-TV's access to recruitment sources and knowledge of hiring conditions.[9] Cap Cities further maintains that KSFO(AM)'s affiliation with Cap Cities' ABC Radio Network and the radio network's affiliation with ABC Television Network news operations will strengthen the news gathering resources of both KSFO(AM) and KGO-TV.

4. Second, regarding the technical facilities involved, Cap Cities affirms that KGO-TV is a VHF television station operating on Channel 7 with 316 kW effective radiated power ("ERP") and an antenna height of 1670 feet above average terrain ("HAAT"). KGO(AM) is a Class A AM station operating full time on 810 kHz with a power of 50 kW using a full-time directional antenna system. KSFO(AM) is a Class B AM station operating full time on 560 kHz with a power of 5 kW using a directional antenna system during nighttime hours only. In support of its contention that the subject facilities do not dominate the market, Cap Cities notes the presence of five other VHF television stations in the San Francisco market, as well as two AM stations with facilities comparable to KGO(AM) and at least five AM stations with facilities comparable to KSFO(AM).

5. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, Cap Cities affirms it does not own any broadcast stations in the San Francisco market other than KGO-TV and KGO(AM). As previously noted, Cap Cities demonstrates that for purposes of the Commission's local radio ownership rule, there are at least 15 radio stations whose contours overlap the proposed commonly-owned radio stations and that the combined audience share of KGO(AM) and KSFO(AM) in the San Francisco metro market is 8.8 percent. *See* note 3, *supra*.

6. Fourth, with regard to the economic status of the stations involved in the proposed combination, Cap Cities states that KSFO(AM) incurred an operating loss in excess of $2 million in 1994, and that First Broadcasting projects a similar loss in 1995 if the station is not sold. Cap Cities notes that since selling KYCY-FM, San Francisco, California, in October 1994, First Broadcasting has been unable to avail itself of efficiencies obtained by operating two commonly-owned stations in the market.

7. The fifth factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI [Area of Dominant Influence] TV market for TV stations." *See Second Report and Order*, 4 FCC Rcd at 1760, n. 101. Cap Cities represents that the San Francisco-Oakland-San Jose ADI is ranked fifth in the United States and contains 18 AM stations, 32 FM stations, 21 TV stations, and over 15 daily newspapers. Cap Cities further represents that the broadcast stations in the market are owned and operated by 47 different "voices." Additionally, Cap Cities notes that the San Francisco market is served by 67 separate cable systems having a penetration rate of 67 percent, and that over 85 percent of households have VCRs. Cap Cities argues that viewpoint diversity in San Francisco generally exceeds that of other markets in the United States, and that the San Francisco market has a greater number of independent broadcast "voices" than markets in which the Commission has recently granted requests for waiver of the one-to-a-market rule under the case-by-case factors.[10]

8. *Discussion.* In evaluating a request for waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Cap Cities' showing in support of a waiver of

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[7] Cap Cities estimates that consolidation of computer systems and staff in the stations' accounting, programming, production, promotion, sales, and traffic departments would result in savings in excess of $450,000 annually. Cap Cities estimates additional annual savings of $45,000 through joint purchasing of administrative and production supplies.

[8] Cap Cities asserts that, under its ownership, KSFO(AM) would air a talk radio format complementing that aired by KGO(AM), which Cap Cities notes airs regular programming addressing issues facing the San Francisco community.

[9] Cap Cities cites the Commission's decision in *Guy Gannett Publishing Co.*, 7 FCC Rcd 1787 (1992), in support of its contention that the Commission recognizes that, in evaluating requests for waiver of the one-to-a-market rule, efficiency benefits may result from common ownership of radio and television stations in the same market even if the stations will be operated separately.

[10] In support of its contentions, Cap Cities cites recent Commission actions granting one-to-a-market rule waivers in *KVI(AM)*, 9 FCC Rcd 1330 (1994); *BREM Broadcasting*, 9 FCC Rcd 1333 (1994); and *Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993). Cap Cities also notes the Commission's April 19, 1994 action granting a one-to-a-market rule waiver under the "Top 25 Markets/30 Voices" standard and a related application for assignment of license KKHI(AM)/KKHI-FM, San Francisco from Buckley Broadcasting Corporation of California to Group W Radio, Inc. (Cal.) *See In re Buckley Broadcasting Corporation of California*, 9 FCC Rcd 1930 (1994).

the one-to-a-market rules meets the Commission's case-by case criteria, and that a waiver in this instance is consistent with the public interest and would not have an adverse effect on diversity and competition in the San Francisco market.[11] Cap Cities has shown that common ownership of KSFO(AM), KGO(AM), and KGO-TV will create efficiencies resulting in significant cost savings and the potential for enhanced programming and service benefits. In particular, joint operation on KSFO(AM) and KGO(AM) will enable KSFO(AM) to avail itself of KGO(AM)'s public affairs programming and community relations departments, resources that will enhance KSFO(AM)'s ability to air public service and public affairs programming, as well as its ability to assess the needs of listeners in the San Francisco community. Additionally, the affiliation of KSFO(AM) with Cap Cities' ABC Radio Network and the radio network's affiliation with ABC Television Network news operations will strengthen the news gathering resources of KSFO(AM), enabling KSFO(AM) to better serve its community. Moreover, Cap Cities affirms that the proposed combination enhances prospects for profitable operation of KSFO(AM), which Cap Cities notes has operated at a loss during the past year under its present ownership. Cap Cities also demonstrates that the proposed combination will not create any undue concentration of ownership or control of broadcast media in the San Francisco market, which comprises the fifth largest ADI. Following the proposed acquisition of KSFO(AM), the market will be served by 58 radio stations and at least 21 television stations.[12] Those 79 broadcast outlets will be owned and operated by 53 separate entities.[13] Other "voices" in the market include at least 4 major daily newspapers and cable television, which has a penetration rate of 67 percent. While the technical facilities of the stations involved are significant, we note that the proposed combination does not present issues of market concentration inconsistent with the public interest given the highly competitive environment in the San Francisco market, both in terms of the number of other broadcast stations and the relevant market shares of the stations involved in this transaction.[14] Thus, we are persuaded that the public benefits of common ownership and joint operation of KSFO(AM), KGO(AM), and KGO-TV outweigh any negative effect on diversity and competition in the San Francisco market that the combination might engender. As Cap Cities observes, the Commission has granted waivers of the one-to-a-market rule under similar circumstances. *See* note 10, *supra.*

9. Accordingly, IT IS ORDERED, that the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(b), IS HEREBY GRANTED, and, having found the parties thereto otherwise qualified, the application for assignment of license (BAL-940628EA) of KSFO(AM), San Francisco, California, from First Broadcasting Company to KGO-AM Radio, Inc. IS HEREBY GRANTED.[15]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[11] Our conclusion takes into account the public interest in a strengthened radio service made possible by waiver of the one-to-a-market rule in this case. *See In re Revision of Radio Rules and Policies,* 7 FCC Rcd at 6394, n.40.

[12] *See Broadcasting & Cable Yearbook* (1994); *see also M Street Radio Directory* (1995).

[13] Notwithstanding Cap Cities' assertion that following the proposed transaction the San Francisco market would be served by 71 broadcast stations owned and operated by 47 separate entities, analysis by the Commission's staff indicates that following the transaction the relevant market will be served by 79 broadcast stations owned and operated by 53 separate entities.

[14] We note that there is substantial competition in the San Francisco market. As documented by Cap Cities, in the Winter 1994 Arbitron Local Market Report for the San Francisco Survey Area, KSFO(AM) was tied for a ranking of twenty-eighth with a 1.0 share and KGO(AM) ranked first with a 7.8 share. *See KVI, Inc.,* 9 FCC Rcd 1330, n.8 (1994).

[15] In response to Question 14 of Assignee's section of the above-captioned application for assignment of license, Capital Cities/ABC, Inc. has reported a decision in *Shepard v. American Broadcasting Companies, Inc.,* No. 88-954, ( Memorandum Opinion and Order, D.D.C. April 15, 1992), *motion for reconsideration granted in part and denied in part,* (Memorandum Opinion and Order, September 3, 1993), *judgment further modified,* (Memorandum Opinion in Support of Final Judgment, June 13, 1994), *notice of appeal docketed,* July 7, 1994, constituting an adverse finding or adverse final action "taken by any court . . . with respect to the applicant or parties to this application in a civil . . . proceeding, brought under the provision of any law related to . . . fraudulent statements to another governmental unit . . . ." The *Shepard* decision, which includes findings of litigation-related misconduct against Cap Cities' subsidiary American Broadcasting Companies, Inc., is presently under appeal. Our action here granting the above-captioned application is without prejudice to whatever action, if any, the Commission may deem appropriate in connection with the *Shepard* findings, which are presently under review in connection with pending applications for renewal of license filed by Cap Cities and its subsidiaries.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-24**

In re

Amendment of Part 74 of the
Commission's Rules With Regard
to the Instructional Television
Fixed Service

**REPORT AND ORDER**

**Adopted: February 7, 1995; Released: February 7, 1995**

By the Commission:

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1. By this *Report and Order*, the Commission adopts rules that will increase the efficiency of our processing of applications for new Instructional Television Fixed Service (ITFS) stations, major amendments to such applications, and major changes to existing stations.[1] We started this proceeding by seeking comment on a new filing system for such applications. In response to the comments received, we requested further comment on several additional proposals intended to increase the efficiency, and curtail potential abuse, of our application processes.[2] We decline to adopt some of the proposals advanced by the commenters to deter speculative filings. However, we believe that, because an ITFS window filing procedure enhanced by an electronic filing and processing system as proposed in our outstanding MDS rulemaking proceeding[3] and by the other modifications adopted herein, will result in a more efficient and effective application processing system, such improvement in expediting new and improved ITFS service and prompting the development of wireless cable service should adequately serve to deter speculative filings in the future.

## THE WINDOW FILING SYSTEM

### General Issues

2. Our goal in this proceeding has been to enhance the efficiency of our processing of ITFS applications. During the past decade, applicants for new ITFS stations or major changes in existing stations have been subject to an A/B cut-off procedure.[4] We questioned in the *Notice of Proposed Rulemaking* in this proceeding whether this procedure is

[1] The ITFS service is not subject to competitive bidding. Even if ITFS licensees receive payments from MDS licensees for use of ITFS spectrum, they do not receive compensation from "subscribers" as that term is used in Section 309(j) of the Communications Act, as amended, 47 U.S.C. § 309(j). *See* H.R. Rep. No. 213, 103d Cong., 1st Sess. (1993) at 481-82; *see also Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2352, n.10 (1994).

[2] A list of commenters can be found in Appendix A.

[3] *See Notice of Proposed Rulemaking* in MM Docket No. 94-131 and PP Docket No. 93-253, 59 Fed. Reg. 63743, 63748 (Dec. 9, 1994) (*Wireless Cable Filing Procedures*).

[4] This procedure involves placing the first application(s) accepted for filing and determined to be substantially complete on a public notice called an "A cut-off list." This list notifies the public that the application has been accepted and gives interested parties 60 days to file competing applications or petitions to deny. An applicant placed on the "A" cut-off list is required to make any major changes to its proposal before the end of the "A" cut-off period. After the "A" period expires, the staff places all substantially complete applications which were filed during that period and found to be mutually exclusive with any listed "A" application on a "B" list. This list notifies the public that

appropriate for the rapidly evolving ITFS service.[5] We stated in the *Notice* that the telecommunications environment has changed substantially since 1985, when the Commission instituted the A/B cut-off procedure.[6] We further observed that the overwhelming majority of tendered applications now include excess capacity lease agreements with wireless cable operators.[7] The *Notice* observed that these changes have fostered a substantial increase in the rate of applications filed for new ITFS stations or major changes in existing stations, creating a significant backlog of applications. We therefore proposed a window filing procedure to allow us to better control the flow of applications and improve processing efficiency.

3. Pursuant to our proposal, we would accept applications for new facilities and applications for major changes in existing facilities only during limited periods (or "windows").[8] We would place applications filed in the window that were not mutually exclusive with any other application, and that were found to be acceptable for filing, on a proposed grant list. We would then provide the immediately following 30 days for the submission of petitions to deny. Uncontested applications would then be granted, if in the public interest. With regard to mutually exclusive applications, we would similarly give 30-day Public Notice for the submission of petitions to deny. Thereafter, we would evaluate those applications under the existing comparative selection process. Any applications currently tendered but not yet placed on an "A" cut-off list would be treated as having been filed and cut off as of the close of the first filing window.

4. Most commenters generally supported the adoption of a window filing system. However, several also argued that other processing reforms are needed to address speculative filings and certain other potential abuses arising from the dramatic regulatory changes that have occurred in the ITFS service in the past several years.[9]

5. First, as noted above, in 1983 the Commission authorized ITFS licensees to lease their excess channel capacity to wireless cable operators. The Commission envisioned a revitalized ITFS service through the activation of underutilized ITFS channels resulting from the revenues which would be derived from the leasing of excess capacity by wireless cable operators. Since this initial action several years ago, the telecommunications environment has changed substantially, as the number and types of video program providers has increased. Thus, we have amended our regulations and policies significantly in order to further stimulate the growth of ITFS and wireless cable services in that new environment. Specifically, we have modified the minimum programming requirements for new ITFS operators,[10] authorized 15-mile interference protection for ITFS licensees which lease excess capacity for wireless cable operations,[11] authorized the use of channel mapping and channelloading technologies by ITFS licensees and wireless cable lessees,[12] and modified our "ready recapture" requirement with regard to excess channel capacity leasing by eliminating unduly restrictive time-of-day and day-of-week regulations.[13] The response to these changes by both educational and wireless cable entities has been enthusiastic, creating the environment necessary for building and maintaining robust ITFS and wireless cable services. By February 25, 1993, when we imposed a freeze on applications for new ITFS stations, more than 800 applications were under review by the staff. Not only did many of these applications require complex technical analysis, but more than 90% of these applications contained excess capacity leases and/or were mutually exclusive.

6. Because the viability of competing wireless cable operators is dependent upon the accumulation of a significant number of channels in a market (critical mass), we were informed that many wireless cable operators were engaging in abusive filing practices intended to impede the inauguration of new or improved ITFS and wireless cable service. For example, some commenters alleged that many wireless cable-supported ITFS applicants submit a large number of applications simply to enable bargaining with other wireless cable entities seeking to construct a viable wireless cable system. Thus, these commenters proposed a cap of applications associated with the same wireless cable entity. Other commenters advocated requiring applicants or their proposed wireless cable lessees to submit with their applications proof of their financial ability to construct. They claimed that such a requirement would deter a significant

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the specified applications have been accepted for filing, and it provides 30 days for the filing of petitions to deny or minor amendments to those applications.

[5] *Notice of Proposed Rulemaking* in MM Docket No. 93-24, 8 FCC Rcd 1275 (1993) (*Notice*).

[6] *Id.* at 1275, citing *Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 49 (1985). Specifically, we noted that we had modified the minimum programming requirements for new ITFS operators, *Report and Order* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Order*) 5 FCC Rcd 6410, 6416 (1990); authorized 15-mile interference protection for ITFS licensees which lease excess capacity for wireless cable operations, *Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Reconsideration*) 6 FCC Rcd 6764, 6766-67 (1991); authorized the use of channel mapping and channel loading technologies by ITFS licensees and wireless cable lessees, *Id.* at 6774 and *Report and Order* in MM Docket No. 93-106, 9 FCC Rcd 3360 (1994) (*Channel Loading Report and Order*); and modified our "ready recapture" requirement with regard to excess channel capacity leasing by eliminating unduly restrictive time-of-day and day-of-week regulations, *Id.*

[7] LOTS OF LEASES In 1983, the Commission authorized ITFS licensees to lease their excess channel capacity to wireless cable operators. *Report and Order* in Gen. Docket No. 80-112 (*Instructional TV Fixed Service*), 94 FCC 2d 1203 (1983). Now, more than 90% of recently filed applications contain an excess capacity lease, and the wireless cable lessee almost always pays for the construction of the ITFS facilities. *Notice* at 1276. Our use of the term "wireless cable" is not intended to suggest that it constitutes "cable" service for statutory or regulatory purposes.

[8] We would continue to accept at any time the filing of applications for minor changes, as defined by Section 74.911(a) of the Commission's Rules, 47 C.F.R. § 74.911(a), as amended herein.

[9] *Order and Further Notice of Proposed Rulemaking* in MM Docket No. 93-24, 9 FCC Rcd 3348 (1994) (*Further Notice*). To avoid potential confusion with the initial set of comments, we shall refer to comments submitted in response to the *Further Notice* as Further Comments and Further Reply Comments.

[10] *Report and Order* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Order*) 5 FCC Rcd 6410 (1990).

[11] *Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 (1991).

[12] *Id.* at 6774; *Report and Order* in MM Docket No. 93-106, 9 FCC Rcd 3360 (1994) (*Channel Loading Report and Order*).

[13] *Order on Reconsideration*, 6 FCC Rcd at 6774.

number of alleged ITFS speculators. Accordingly, we released a *Further Notice of Proposed Rulemaking* in which we addressed their suggestions, as well as other proposals to further enhance processing efficiency.

7. In the *Further Notice*, we tentatively concluded that a window filing system would serve the public interest. Currently, for instance, simply to allow the release of an "A" cut-off list, each application must undergo a substantive engineering analysis upon filing. No applications are granted or denied in this stage of processing. Subsequently, after the "B" cut-off period, each application undergoes a second technical analysis in order to determine whether it is grantable. Because each of these analyses requires significant resources, eliminating the duplicative step would substantially improve processing efficiency. In addition, the *Further Notice* found that a window filing procedure would allow us to better control the flow of applications. We also noted that it would prevent speculators from filing against applicants that had appeared on an "A" cut-off list.

8. Based on the record before us, we conclude that adoption of the window filing proposal would allow the Commission to accept, consider, and dispose of ITFS applications in the most efficient and timely manner possible. As a result, we believe that the public interest would be served by our adopting a filing window procedure, as enhanced by the aforenoted proposed electronic filing and processing system and by the other policy and rule modifications adopted herein. Specifically, to diminish the incentive of frequency speculators to submit applications for permits that they intend to later assign for profit, we will limit the allowable consideration for the sale of unbuilt ITFS facilities to out-of-pocket expenses. Also, we refine our rules on granting protected service areas requested for wireless cable lessees by providing such protection solely against subsequently proposed operations. We believe that such a policy will eliminate the practice by some ITFS applicants and licensees of requesting interference protection solely to create mutual exclusivity with otherwise grantable, previously filed ITFS applications. We also adopt other technical proposals that will further streamline our ITFS window application filing system. These improvements, we believe, should expedite the inauguration of new and improved ITFS service and prompt the continued development of the wireless cable service.

**Implementation of the Window Filing System**

9. *Public Notice*. At the commencement of this proceeding, the initial *Notice* asked commenters to address how far in advance a window should be announced. Most commenters directly addressing this issue suggest a 60-day period, noting that this is the same time period within which parties now have to respond to the release of an "A" cut-off list.[14] In contrast, Hardin and Associates, Inc. (Hardin) suggests the issuance of Public Notices 150-180 days before the first filing window, alleging that nonleasing educators will need more than 60 days to prepare their applications. It also predicts that the likely substantial number of applications submitted in the first window will deter nonleasing educators from filing.[15]

10. We decline to adopt Hardin's proposal. Rather, we agree with the majority of commenters that a 60-day period will provide potential applicants adequate notice.[16] As most commenters observe, this is the same period within which parties currently have to file an application in response to an "A" cut-off list. Thus, educational institutions will experience no change from the existing system in this regard. Notably, there is no indication in the record that this has been an insufficient period of time in the past. Similarly, there is no indication that nonleasing educators need additional time within which to prepare for the initial filing window. Nonleasing educators that have been relying upon funding from the National Telecommunications and Information Administration (NTIA) have not been subject to the ITFS application filing freeze imposed in the *Notice* and they have not been prevented from preparing and submitting any applications they have chosen to file. Further, we anticipate opening filing windows frequently, providing nonleasing educators, as well as all others, many opportunities to submit their applications.

11. *Geographic Scope*. Addressing whether the window should be regional or national, one commenter claims that a regional window would expedite processing and give greater certainty to wireless cable operators assembling channels.[17] Another asserts that a national window would encourage the filing of more applications than the Commission could efficiently process, because parties would tender applications solely to avoid losing potential access to most major markets.[18] Some commenters claim that a market-based window would likely concentrate initially on larger markets, thereby disserving educators located in less populated areas.[19]

12. Potential inefficiencies caused by the submission of a large number of applications during a national window are significantly diminished by our likely adoption of an electronic filing system for ITFS applications, which we expect would substantially accelerate processing.[20] While a regional window system might aid some wireless cable operators' long-term planning, we believe that such a window would unfairly require educators not located within the relevant area to delay their educational plans. Moreover, the rules

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[14] *E.g.*, Wireless Cable Association International, Inc. (WCA) Comments at 9-10.

[15] Hardin Further Comments at 1.

[16] Should events in the future demonstrate otherwise, the rules we are adopting today will still allow us to issue a Public Notice more than 60 days before the opening of a window. We also note that interested parties can begin preparing their applications before the release of the Public Notice.

[17] ACS Enterprises, Inc., Cablemaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Superchannels of Las Vegas, Inc., and Wireless Holdings, Inc. (ACS) Further Comments at 3.

[18] WJB-TV Limited Partnership (WJB-TV) Comments at 11-12.

[19] WJB-TV Comments at 11-12; RuralVision South, Inc. and RuralVision Central, Inc. (RuralVision) Comments at 4-5.

[20] *See Wireless Cable Filing Procedures*, 59 Fed. Reg. at 63748 (Dec. 9, 1994).

herein adopted will enhance processing efficiency, as discussed below, thereby reducing any potential negative effect of the submission of a greater number of applications. Finally, anational window will allow all interested parties to commence or continue their ITFS and MDS plans as soon as possible. This will provide the certainty of an imminent filing opportunity to all wireless cable entities, not just those within a restricted geographic area. Therefore, we conclude that educators, as well as wireless cable lessees, will be better served by a national window, which we accordingly adopt.

13. *Duration of Window*. The *Notice* also sought comment on how long we should generally keep filing windows open. WCA states that five business days, when combined with the 60-day Public Notice period, should provide ample opportunity for all potential applicants to file.[21] Based on the record before us, we agree. Further, this period is short enough to allow the staff to begin processing an application almost immediately after its receipt, especially if the proposed electronic filing and processing system for ITFS applications is adopted. We note that the low power television service also generally keeps its filing windows open for five business days.[22] Moreover, if this period of time should prove to be insufficient, we retain the flexibility to keep future ITFS windows open for a longer period.

14. *Frequency*. We next address how often to open a filing window. Some commenters support a fixed schedule, arguing that this would allow educators to plan their proposals in advance of the Public Notice. They also advocate the nondiscretionary opening of a window at least once each quarter, asserting that frequent filing periods are necessary to avoid unduly delaying the licensing of ITFS facilities that are essential to the growth of the wireless cable industry.[23]

15. We believe that we should take a more cautious approach as we structure the window filing system. Because we have never before utilized this kind of filing system for ITFS applications, we cannot yet know what will prove to be the most efficient timetable for the acceptance and disposition of applications. Further, because the rate of the submission of applications could vary significantly in the future, a fixed requirement could quickly and unpredictably become counterproductive or impracticable to meet. As previously indicated, however, we intend to open filing windows as frequently as is consistent with our goals of efficient and expeditious processing.

16. *Amendments*. Some commenters propose that, after a filing window closes, the Commission should prohibit amendments that demonstrate eligibility, improve comparative standing, or seek rule waivers.[24] Currently, they claim, many applicants impose an unnecessary burden on the Commission by filing such amendments, such as requests for waiver of the four-channel-per-market rule, Section 74.902(d) of the Commission's Rules, 47 C.F.R. § 74.902(d).[25]

17. We agree that amendments that pertain either to improving comparative standing or to establishing eligibility, as set forth in Sections 74.913(b) and 74.932(a) of the Commission's Rules, respectively, 47 C.F.R. §§ 74.913(b) and 74.932(a), should not be filed outside the window period. Similarly, we shall prohibit the filing of amendments to a facility's proposed technical operations, including amendments to add any receive sites, outside the window. Such engineering amendments often require a time-consuming re-analysis by the staff of the amendment's effects on other applications and thus delay the processing of all pending applications. However, with the above two exceptions, such delay is not inherent in non-engineering amendments, including requests for waiver of the four-channel rule, and we will consequently permit their filing.

**Exceptions to the Filing Window**

18. *NTIA-Funded Proposals*. In the *Further Notice*, we advanced a proposal designed to assure fairness to applicants relying on NTIA funding. We noted that NTIA rules require a party seeking a grant to have already filed its application with the Commission, and that those requests are subject to an annual January deadline. Accordingly, in order not to obstruct these grants, we proposed allowing applications that rely upon NTIA funding to be filed each December. We proposed to consider such applications, if filed outside a window period, as having been filed during the next window. We now adopt that proposal, with a slight modification, because NTIA funding deadlines may vary from year to year. Accordingly, during the 30 days preceding the annual deadline, rather than every December, we shall allow the tendering of applications that rely upon NTIA funding, and they shall be considered as having been filed during the current or immediately subsequent window, whichever is appropriate.

19. *Major Changes*. Several commenters also propose various exceptions to the window filing system. The Educational Parties propose that applications for major changes be exempt from the window filing requirement. They claim that such changes are needed to resolve coverage problems discovered only after the facilities begin operation. Further, they argue that such applications constitute only a small proportion of ITFS applications submitted to the Commission. In the alternative, some commenters propose the opening of additional windows solely for such applications.[26]

20. We decline generally to exempt the filing of major change applications from the window filing process, and, as discussed at paragraph 17, above, we similarly decline to

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[21] WCA Comments at 10.

[22] Section 73.3572(g) of the Commission's Rules, 47 C.F.R. § 73.3572(g).

[23] American Council on Education, American Association of Community Colleges, Arizona Board of Regents for Benefit of the University of Arizona, Association for Higher Education, California State University - Sacramento, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, St. Louis Regional Educational and Public Television Commission, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation (Educational Parties) Further Comments at 8-10; WCA Further Comments at 6-8; ACS Further Comments at 3; American Telecasting, Inc. (American Telecasting) Further Comments at 2-3; Heartland Wireless Communications, Inc. (Heartland) Further Comments at 3; North American Catholic Educational Programming Foundation, Inc., Network For Instructional TV, Inc., and Shekinah Network (North American Catholic) Further Comments at 7-8.

[24] WCA Comments at 8-9; Educational Parties Reply at 6.

[25] WCA Comments at 8, n.11, citing, *e.g.*, File Nos. BPLIF-920319DL, *et al.*

[26] Educational Parties Comments at 12-13; WCA Reply at 5-6.

exempt amendments with similar effects. By definition, such changes can substantially impact both existing and proposed facilities. Accordingly, for the purpose of the window filing procedure, they should be treated the same as applications for new facilities. However, consistent with existing practice, we shall continue to make a narrow exception for amendments to pending applications that would resolve mutually exclusive applications without creating any additional interference. We will accept such amendments at any time, and we shall provide a 30-day period for the submission of petitions to deny those amendments. We believe that this will most efficiently bring new or improved service to the public. Further, to encourage market settlements, we shall now allow licensees of existing facilities to submit at any time applications for major changes, as long as the changes are essential components of a settlement involving mutually exclusive applications.

21. *Other Proposals*. The Educational Parties propose that educators have an additional 60 days after the close of the filing window to file mutually exclusive applications against any MDS application for an ITFS channel.[27] These parties argue that the "A" cut-off list currently provides such a period, to ensure the continued availability of ITFS channels to educators. We decline to adopt the proposal. A wireless cable entity will continue to be ineligible to file for an ITFS channel unless a specified number of vacant channels would remain available for ITFS use after the "proposed authorization.[28] Further, as now, we generally will not consider an MDS application that is mutually exclusive with an ITFS application.[29] These rules protect the rights of educators to acquire ITFS licenses, and they ensure their continued availability as against MDS applicants. Also, all educators have the same opportunity as wireless cable entities to prepare and apply for a particular ITFS frequency during a particular filing window. If no educator has expressed an interest in a certain channel, we see no reason to delay the efficient use of that frequency by another entity, especially when other ITFS frequencies are available to accommodate the needs of local educators. We believe that this will allow for the most efficient use of the spectrum.

22. National ITFS Association (NIA) proposes that when an application is filed by a nonlocal applicant with an excess capacity lease, the window should remain open for another 60 days to allow for the filing of competing applications by local nonleasing educators. According to NIA, this would protect plans that otherwise would be made obsolete by another party's filing during a window that would occur before the educator could prepare and file its own application.[30] More expansively, California State University, Northridge (CSU Northridge) advocates a blanket exemption from the window for all educators not associated with a wireless cable lessee, alleging that such an exemption would allow such educators to rapidly meet their communities' changing needs. It predicts that few applications would fall within this category, thus making inconsequential any resultant burden on the Commission's processing. To prevent abuse of this exemption, the commenter would prohibit the applicant from leasing its excess capacity for three years after grant of the license.[31]

23. We do not believe that either NIA or CSU Northridge's proposal would serve the public interest. Both would cause significant disruption to the window filing system. Further, we see no reason to distinguish between educators with and without excess capacity leases for these purposes. The public interest served by educational programming is not diminished by a licensee's affiliation with a wireless cable operator, which over the past several years has often been the only way to finance its ITFS facility. Moreover, in order for the proposals to have their intended effect, we would have to prohibit educational licensees without excess capacity leases from later leasing their excess capacity. Such a prohibition could harm educators by adversely impeding the development or continuation of ITFS service. We therefore decline to adopt these proposals.

## PROPOSALS TO IMPROVE THE APPLICATION PROCESS

24. As argued by the commenters and noted in the *Further Notice*, the goals of the proposed window filing procedure could be maximized if we at the same time enacted additional rules that would increase its efficiency. Therefore, we set forth several proposals, many initially advanced by the commenters, that were intended to improve service to the public or otherwise enhance processing efficiency. Our analysis of each of the proposals will be affected by two factors. First, as noted above, we plan to implement an electronic filing and processing system for ITFS applications, thereby greatly accelerating their disposition. Adoption of this system would diminish the negative impact that a large number of applications has had on our processing in the past. Second, implementation of the proposals adopted herein and strict enforcement of our existing rules will, we believe, eliminate many of the inefficiencies and alleged abuses of the existing processing system.

### Financial Qualifications

25. *Proposal*. In response to the *Notice*, two commenters[32] proposed to require applicants or their prospective wireless cable lessees to submit with their applications proof of their financial ability to construct.[33] In the *Further Notice*, we postulated that such a requirement might deter a significant number of ITFS speculators. We also asked whether we should require separate financial documentation for each station applied for, and whether we should require the wireless cable lessee to submit the documentation when it is paying for construction of the

[27] Sections 74.990-992 of the Commission's Rules, 47 C.F.R. §§ 74.990-992, set forth the limited circumstances under which an MDS entity may file in its own right for an ITFS channel.

[28] Section 74.990(a) of the Commission's Rules, 47 C.F.R. § 74.990(a).

[29] Section 74.990(e) of the Commission's Rules, 47 C.F.R. § 74.990(e).

[30] NIA Comments at 4.

[31] CSU Northridge Further Comments at 1-2.

[32] WJB-TV Comments at 9-10; WCA Reply at 3-4.

[33] Currently, applicants are required to certify their financial ability or their reliance upon NTIA funding.

facilities. In addition, we asked whether such documentation would likely become the basis of frivolous petitions to deny.[34]

26. *Comments*. Hispanic Information and Telecommunications Network, Inc. (HITN) and ACS dispute the assertion that speculation is a problem, arguing that the majority of channels in the most desirable markets have now been licensed. Thus, they aver that no change in the application process is necessary.[35] While other commenters regard speculation as a continuing problem, most nevertheless oppose a change. They argue that compiling the necessary documentation could impose a significant burden on educational institutions, especially those not leasing their excess capacity. Further, they assert, any enhanced processing efficiency would be countered by the diversion of the staff resources needed to analyze each financial submission.[36] In addition, according to these commenters, the requirement could easily become a basis for frivolous petitions, further delaying the grant of applications.[37] In their opposition, then, HITN, ACS, and RuralVision are in accord with the Educational Parties, who had earlier supported the proposal,[38] but who now oppose it.

27. Supporters of changing the existing certification requirement generally address the financial qualifications of the excess capacity lessee, rather than of the educator.[39] Various options supported by these commenters include: requiring the wireless cable lessee to certify its qualifications as part of the ITFS application;[40] requiring certification from the lessee, but also requiring the educator applicant to possess detailed supporting financial documents;[41] and requiring educators and lessees to demonstrate, not merely certify, their financial qualifications in the application. With regard to the last variant, Central Texas alleges that, because the submissions would include audited financial statements, the staff would not expend significant resources in its analysis.[42]

28. Also, proponents of changing the existing certification requirement generally would require the wireless cable operator, in demonstrating its financial qualifications, to incorporate all of its obligations to construct and operate any other ITFS facilities.[43] To discourage abuse of any new informational requirement, they propose, the Commission should perform random spot checks on applicants and their lessees.[44]

29. *Discussion*. ITFS applicants must have reasonable assurance that sufficient net liquid assets are on hand or available from committed sources to construct and operate the station for three months without additional funds. The applicant certifies that it has such access, and the Commission relies upon that certification. The record does not indicate that our reliance in this regard has been ill-placed. Further, we believe that the submission of detailed financial information would in practice neither increase processing efficiency nor deter abuse. Collecting the data would impose significant costs on the wireless cable lessee, regardless of whether the supporting documents were kept on hand by the educator or submitted to the Commission. We believe that a sound analysis of all of the incoming detailed financial submissions would consume a great deal of the staff's time, severely slowing the rate of processing. Conversely, any reliance on the documents without our own rigorous independent analysis would enable us to detect only a small proportion of potential abuse. Moreover, the record contains no information diminishing our concern that the financial information submitted would become fodder for frivolous petitions to deny.

30. A financially unqualified educator would generally not be able to complete construction within the prescribed period. Because that educator would then need an extension of time within which to construct, it would have to submit an appropriate application to the Commission, explaining the reasons for its delay in construction. Thus, we already have a process in place by which we can monitor and assess ITFS licensees' progress in constructing their authorized facilities and forestall any dilatory conduct on their part. APS Should it become necessary in the future, we can revise this process accordingly.

**Application Caps**

31. *Proposals*. We now address two proposals, raised in response to the *Notice* by the Educational Parties, to limit the number of certain types of applications that can be filed during a filing window.[45] The first would impose a cap of 25 applications associated with the same wireless cable entity, including any entity with direct or indirect common ownership or control. The second proposal would limit an individual nonlocal ITFS entity to filing no more than three to five applications during a window. To support this restriction, the Educational Parties argued that nonlocal applicants often work with wireless cable entities as frequency speculators.[46]

32. *Comments*. The overwhelming majority of interested commenters oppose the adoption of either type of cap. Many stated that such restrictions would significantly restrain ongoing efforts to create viable wireless cable and ITFS systems.[47] First, with regard to the wireless cable cap,

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[34] *Further Notice* at 3350.

[35] HITN Further Comments at 3; ACS Further Comments at 6.

[36] *E.g.*, RuralVision Further Comments at 3-4; Educational Parties Further Comments at 11-13.

[37] HITN Further Comments at 4; RuralVision Further Comments at 3-4.

[38] Educational Parties Reply at 3.

[39] *See, e.g.*, Central Texas Wireless TV, Inc. (Central Texas) Further Comments at 3-4.

[40] WCA Further Comments at 21-22.

[41] North American Catholic Further Comments at 2-3; American Telecasting Further Comments at 6.

[42] Central Texas at 3-4; United States Interactive and Microwave Television Association (US Interactive) Further Reply at 2-3. Under this proposal, educators without excess capacity lessees would continue to certify their financial qualifications, as they do now.

[43] *E.g.*, WCA Further Comments at 21; North American Catholic Further Comments at 2-3.

[44] WCA Further Comments at 21-22; North American Catholic Further Comments at 3; American Telecasting Further Comments at 6.

[45] *Further Notice* at 3350-51.

[46] Educational Parties Comments at 14-15; Educational Parties Reply at 6-7. Citing Section 73.3564(d) of the Commission's Rules, 47 C.F.R. § 73.3564(d), the commenter notes that in low power filing windows, the Commission limits the number of filings by commonly controlled entities.

[47] *See, e.g.*, Educational Parties Further Comments at 13-14; Heartland Further Comments at 4-5.

one commenter alleges that a limitation would prevent wireless cable companies from utilizing the economies of scale that currently benefit their wired cable competitors.[48] Also, RuralVision contends that a school district's need for educational programming is no less compelling when its excess capacity lessee has similar leasing agreements with different parties.[49] Only one commenter supports an outright cap based on the identity of the wireless cable lessee, arguing that it would speed processing and prevent wireless cable entities from overextending themselves.[50] A few commenters would support such a cap only if it excluded the operators allegedly most likely to construct, *i.e.*, those that already have access (by license or by lease) to a specified minimum number of MDS and/or ITFS channels in the area.[51]

33. The proposed cap on nonlocal ITFS entities is similarly unsupported by many of the commenters addressing the issue. ACS asserts that it is unnecessary, as the window filing system will eliminate most of the problems associated with speculation.[52] Also, North American Catholic contends that nonlocal educational entities, due to their economies of scale, are critical to bringing distance learning to many schools that otherwise might not be able to afford it. It adds that nonlocal entities serve important area needs, noting that they must submit letters of intended use from local accredited schools to establish their basic eligibility for the license.[53] Supporters dispute that claim, with one arguing that nonlocal entities lack community ties, are less familiar with local programming needs despite the local programming committee's input, and tend to associate with frequency speculators.[54] Further, according to the Educational Parties, the Commission already treats local and nonlocal applicants dissimilarly through the ITFS license eligibility criteria, thus setting a precedent for disparate treatment in this area.[55]

34. *Discussion*. Adoption of either of the proposed restrictions would certainly eliminate any processing burden and limit multiple filings associated with potential frequency speculators. However, these benefits would come at immense cost. To suddenly impose limits on the number of applications that particular parties may be affiliated with would slow both ITFS and wireless cable development. Further, it would artificially constrain MDS operators' business decisions as to the number of ITFS channels needed to establish economically viable wireless cable operations. These costs would not be sufficiently offset by exempting applications associated with wireless cable entities that already have a significant market presence, as this would unfairly penalize an educator for exercising its discretion as a licensee to lease excess capacity to a particular party. Moreover, suggestions by some commenters that nonlocal entities are not adequately serving local educational needs are unsupported. Finally, we can deter the speculation complained of by the less restrictive process of analyzing construction extension applications, as noted above at paragraph 30. Accordingly, based on the record before us, we decline to adopt either of the proposed application caps.

**Assignment of Unbuilt Facilities**

35. In the *Further Notice*, we proposed to formalize our current practice of limiting the allowable consideration for the assignment of authorizations for unbuilt ITFS facilities to out-of-pocket expenses, as we do with broadcast construction permits. Our stated goal was to diminish the incentive of frequency speculators to submit applications for authorizations that they intend to later assign for profit.[56] Every commenter addressing this issue supports the proposal, agreeing that it would help deter abuse.[57] We agree that this limitation, applicable to broadcast construction permits, will have similar deterrent effects on frequency speculation in the ITFS service, and we shall therefore adopt it. Therefore, licensees assigning construction permits for unbuilt ITFS facilities will have to submit documentation of their reasonable and prudent out-of-pocket expenses with their assignment applications.[58] American Telecasting suggests that we extend the rule to cover wireless cable lessees, claiming that the rule as proposed does not preclude speculation in excess capacity leases. We decline to do so. As wireless cable entities accumulate channels or channel access in various markets, they approach the critical mass necessary to operate competitive MDS systems. Therefore, acquisition of a small number of additional channels may be integral to the inauguration of a wholly new video service to an area's population, and restricting the alienability of ITFS leases might delay the orderly completion of viable MDS systems.

**Excess Capacity Lease Terms**

36. *Proposal and Comments*. Our existing policy does not authorize an educator to execute a lease agreement the term of which extends beyond the end of the educator's license term.[59] Consequently, depending on how many years remain in the term, there may be situations in which our policy would prohibit a lease agreement to extend beyond one or two years. At most, MDS operators can have contractual access to ITFS channels for no more than ten years, the length of a full license period. ACS, supported by WCA and CAI Wireless Systems, Inc. (CAI), proposes that we modify our policy to allow parties to negotiate lease agreements whose terms extend beyond the end of the license term. The proposal is unopposed.

37. The proponents of this proposal argue that a wireless cable operator can have no assurance that it will be able to retain beyond the ITFS license term its leasehold rights for its use of the ITFS channels. Pursuant to existing Commis-

[48] National Micro Vision Systems, Inc. (National Micro Vision) Further Comments at 2.
[49] RuralVision Further Comments at 5.
[50] Central Texas Further Comments at 5-6.
[51] *See, e.g.*, Educational Parties Further Comments at 13-14; WCA Further Comments at 22-24.
[52] ACS Further Comments at 8-9.
[53] North American Catholic Further Comments at 5-6, citing Section 74.932(a) of the Commission's Rules, 47 C.F.R. § 74.932(a).
[54] Central Texas Further Comments at 5.
[55] Educational Parties Further Comments at 15.
[56] *Further Notice* at 3351.
[57] *E.g.*, ACS Further Comments at 11; WCA Further Comments at 29; Central Texas Further Comments at 7; and Educational Parties Further Comments at 16-17.
[58] *Cf.* Section 73.3597(c)(2) of the Commission's Rules, 47 C.F.R. § 73.3597(c)(2).
[59] *See, e.g., Blackwell Consolidated Independent School District*, 9 FCC Rcd 1721, 1722 (1994).

sion policy, an educator wishing to afford the MDS operator a reasonable lease term is prohibited from agreeing to extend the lease agreement beyond the current ITFS licensee's term. According to the commenters, this significant uncertainty deters potential financiers from investing in new MDS systems. CAI adds that it also negatively affects negotiations over possible future business arrangements with telephone companies, such as those involving video distribution agreements.[60]

38. *Discussion*. We are mindful that the wireless cable industry requires substantial equity investment in order to become a viable competitor in the video marketplace. We also realize that a potential financier is likely to exercise caution before investing in an MDS system, where there is uncertain long-term availability of the ITFS channels that provide the basic capacity for that system. The record demonstrates that adoption of the unopposed proposal to extend the allowable lease term would have substantial benefits. Authorizing lease agreements that extend beyond the end of the license term would reduce the anxiety of potential investors that the MDS entity would shortly lose four channels, crippling the entire system: a ten-year lease appears far more reliable and stable than a two-year lease. The increased confidence of investors will significantly accelerate the development of the wireless cable industry and provide competition to wired cable. Hence, we are revising our policy to permit an educator, if it chooses, to execute a 10-year lease agreement without regard to the duration of the educator's current license term. In previous cases, the Commission granted ITFS licenses subject to the revision of lease provisions that extended beyond the 10-year license term because such provisions were viewed as inconsistent with the terms of the license.[61] Upon reexamination of this issue, however, we conclude that the policy adopted here better serves the public interest. The existence of a lease in no way affects the duration of that license or the licensee's future use of the frequency, but it nevertheless allows the benefits discussed above. Thus, we will require only that ITFS lease agreements that extend beyond the end of the license term note that such an extension is contingent on the renewal of the educator's license. As a result, our policy in this regard becomes similar to that governing television broadcast licensees and their network affiliation agreements.

**Application of the Four-Channel Rule**

39. *Proposal*. We seek to provide as many educators as possible with the opportunity to operate ITFS systems that meet their educational needs. Consequently, the four-channel limitation rule, Section 74.902(d) of the Commission's Rules, 47 C.F.R. § 74.902(d), generally limits an ITFS licensee to four channels for use in a single area of operation. However, because we have never formally defined what constitutes an "area of operation," educational institutions at times have been uncertain as to what channels they could apply for, and unsure as to when a four-channel rule waiver showing was required. The *Further Notice* proposed to adopt the staff's informal policy of considering a single area of operation for this purpose to extend no farther than 20 miles from the transmitter site. We posited that such a clear benchmark would be easy for applicants to comply with and, due to its ease of application, would also increase the speed of processing. Alternatively, we queried whether we should instead define an area of operation in terms of interference, such that two sites would be considered to be in different areas of operation, as long as a licensee could operate at maximum authorized power on the same channel at each site without co-channel interference.[62]

40. *Comments*. A number of parties addressing the issue oppose a standard based on mileage. ACS argues that the use of 20 miles as a benchmark would be arbitrary and inconsistent with the Commission's statement, in a discussion of an unrelated rule elsewhere in the *Further Notice*, that an educator is unlikely to serve a site that is more than 35 miles from the transmitter.[63] In this regard, some commenters contend that many ITFS stations serve sites more than 20 miles from the transmitter.[64] Under a mileage-based definition, HITN argues that two cochannel stations more than 20 miles apart would be considered to be in different areas of operation, even if they would in fact interfere with each other. Thus, HITN and RuralVision advocate the proposed interference-based definition.[65] One commenter advocates combining the two proposals. Specifically, Central Texas supports the 20-mile definition, but adds that, if an applicant could show that two sites less than 20 miles apart could nevertheless operate without co-channel interference, it should be allowed to operate up to four channels at each site without violating the rule. The commenter classifies this as a flexible approach that takes area terrain into account. It also helps large rural areas served by only a few schools that are qualified to become ITFS licensees, according to Central Texas.[66]

41. A few commenters, broaching a definition not advanced in the *Further Notice*, propose to link the definition of an "area of operation" to the facility's protected service area, thereby making the rules governing ITFS and MDS more consistent.[67] To foster the expansion of ITFS service, North American Catholic recommends waiving the rule for any applicant proposing more than four channels within the 15-mile protected service area, as long as there are no competing applications for those channels.[68] The Educational Parties also advocate a definition not discussed in the *Further Notice*, based on whether the second facility is necessary to serve receive sites that cannot reasonably be

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[60] ACS Further Comments at 19; WCA Further Reply at 21-22; CAI Further Reply at 8-11.

[61] *See, e.g., Rock Port R-II Schools*, 9 FCC Rcd 7342, 7343 (1994).

[62] *Further Notice* at 3351.

[63] ACS Further Comments at 12, citing *Further Notice* at 3352. The two rules have different purposes, as we discuss further at paragraph 60 below.

[64] CSU Northridge Further Comments at 2; RuralVision Further Comments at 6-7.

[65] HITN Further Comments at 7-9; RuralVision Further Comments at 6-7.

[66] Central Texas Further Comments at 7-8.

[67] North American Catholic Further Comments at 5; Hardin Further Comments at 2; ACS Further Comments at 12. The protected service area is discussed more fully below, at paragraph PSA45.

[68] North American Catholic Further Comments at 5. A smaller area would allow an educator to place receive sites without a waiver in locations for which it would otherwise need a waiver, i.e., between 15 and 25 miles from the transmitter. Thus, a licensee would be able to have more receive sites, and they could be located more compactly.

served by the first. Specifically, if all of a second facility's proposed receive sites can be served by both facilities, the stations would be duplicative and considered to be in the same area of operation. Thus, they add, some service overlap would be acceptable if it were the only way to reach some receive sites.[69]

42. *Discussion.* Having examined the record before us, we find that the mileage proposal that is currently in use by the staff should be the basis of the rule. Our experience has demonstrated that this standard is efficient and easily understood and implemented. Determining a station's area of operation by use of the interference approach would require a considerable amount of technical analysis by the staff. As a consequence, adoption of this proposal could inordinately slow processing and delay service to the public. We also see no reason to link the four-channel rule to the conceptually unrelated protected service area. The protected service area is based on the service area of a commercial wireless cable entity; the four-channel rule's area of operation is based on the educational needs of the ITFS licensee. Further, neither the record nor our experience suggests that an educator's area of operation is in fact limited to the smaller 15-mile area covered by the protected service area and should accordingly be diminished from the currently applied standard. Indeed, as noted above, several educators have commented that, not infrequently, ITFS facilities serve receive sites more than 20 miles away.

43. We also reject the Educational Parties' proposal that we base our definition on whether the second facility is necessary to serve receive sites that cannot reasonably be served by the first. This proposal would be susceptible to significant abuse, because it would allow applicants to design a series of closely spaced systems, each with one or a few receive sites that could not be served by the prior system. These systems would then be considered to be in separate areas of operation, despite the substantial overlap in service area that could result. We do not believe that this result would be consistent with our intent to preserve as much channel capacity for as many educational applicants as possible.

44. In adopting the 20-mile criterion, we recognize that any mileage standard will be imprecise, because there will always be educators that serve sites beyond the designated distance. However, the bright-line test we are adopting today has the important advantage of being easy for applicants to comprehend and apply. Further, the Commission staff can process applications far more efficiently using this standard. Moreover, Commission staff, educators, and wireless cable entities are extremely familiar with this standard, having utilized it for a number of years. Thus, it will foster much more rapid processing of applications and inauguration of service to the public. Our long experience with the 20-mile standard suggests that it is a practical and effective tool. We also note that many of the concerns expressed by the commenters can continue to be addressed on a case-by-case basis. Specifically, if an applicant can present good cause to waive the four-channel rule, we will consider the public interest benefits of doing so.[70]

**Protected Service Areas**

45. *Proposal.* The *Further Notice* also solicited comment on a proposed change in the application of protected service areas for wireless cable lessees. Currently, we provide a 15-mile interference protection for a service area regardless of receive site locations, but solely at the request of the ITFS applicant or licensee. Generally, this benefits the wireless cable lessee, because it ensures interference protection within an area where receive sites are not specified, or extends protection over an area where receive sites are not currently located. By so doing, these areas provide a measure of protection to lessees, thereby encouraging new or improved wireless cable service.[71]

46. The *Further Notice* observed that an applicant for new facilities often requests and receives interference protection that restricts an existing licensee lacking such protection from pursuing certain modifications to its facilities. At the same time, an existing facility that has not requested such protection, upon learning that an application for a nearby operation has been filed, often requests interference protection and possibly obstructs the new applicant. The *Further Notice* expressed the view that these practices may be an abuse of our processing system that diminishes competition, significantly impacts our processing, and delays the inauguration of new or improved service to the public. Moreover, we stated, such practices unfairly disrupt existing operations and already-proposed facilities. We therefore proposed to apply interference protection only prospectively, making it effective solely with regard to applications filed after the protection request. We asked commenters whether our proposal would sufficiently diminish the disruption and delay resulting from the current system. We also asked commenters to address a specific application of the proposed rule: If two applications are (1) submitted during the same filing window, (2) otherwise grantable, and (3) mutually exclusive only because both applicants request a protected service area, we proposed to consider them as mutually exclusive.[72]

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[69] Educational Parties Further Comments at 17-18.

[70] *See WAIT Radio v. FCC*, 418 F.2d 1153 (1969). Our action herein, we believe, meets the directive of the court to analyze and clearly define an "area of operation" for the purposes of the four-channel rule. *See also Hispanic Information and Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989), *remand pending*.

[71] *Wireless Cable Reconsideration* at 6765-67.

[72] *Further Notice* at 3352.

47. *Comments.*[73] Only two parties oppose the proposal to apply the 15-mile protected service area prospectively only: the Educational Parties, who claim that there has been no abuse of the protected service area,[74] and United States Interactive and Microwave Television Association, who claims it would not deter frequency speculators.[75] Most commenters addressing the proposal express support.[76] HITN advocates the proposal, but would exempt existing facilities. According to HITN, wireless cable lessees must be able to apply the protected service area regressively, in order to address what it claims is the most frequent abuse of the protected service area. Specifically, according to the commenter, another wireless cable operator often finds a number of educators to apply for licenses in several small markets that encircle a larger market, thereby shrinking the larger market's service area by their protected service areas. HITN claims that this hinders the future, orderly development of wireless cable systems in large markets, and that its proposed exception is needed to prevent further abuse.[77]

48. Four commenters address whether we should consider as mutually exclusive two applications that are submitted during the same filing window, otherwise grantable, and mutually exclusive only because both applicants request a protected service area. United States Interactive and Microwave Television Association opposes the proposal, again claiming that it would not deter speculators.[78] RuralVision and WCA, however, profess support.[79] The former commenter also proposes an exception under a particular set of circumstances. Specifically, RuralVision proposes that this aspect of the rule be waived if the applicant can demonstrate that (1) less than five percent of another applicant or licensee's protected service area would receive interference, and (2) the nature of that area is such that no subscribers or potential subscribers would be affected by the interference (within a lake, for example). Under such circumstances, it states, the applications should not be considered mutually exclusive.[80] Opposing RuralVision's proposed exception, WCA responds that the Commission has already rejected automatic waiver of MDS interference protection standards where the interference is minimal.[81]

49. Finally, two commenters propose that the Commission in the future grant the protected service area automatically, unless specifically declined by the applicant.[82] One of these commenters also requests the Commission to grant 15-mile protected service areas to all current licensees and applicants, to the extent that they have such reach after consideration of all previously filed applications.[83]

50. *Discussion.* For the reasons stated in the *Further Notice,* we conclude that the public interest will be served by adoption of the proposal to apply protected service area protection only prospectively. Thus, an applicant for new facilities will no longer be able to receive interference protection that restricts an existing licensee without such protection from seeking certain modifications to its facilities. Similarly, an existing facility without such protection will not be able to request interference protection that obstructs the new applicant. Adoption of the proposal will diminish disruption to existing and proposed facilities. We reject, however, HITN's proposed exception concerning existing facilities. For more than three years, ITFS licensees have been afforded the unrestricted opportunity during their initial construction periods and thereafter to request protection for their facilities, if they so chose. The record does not reflect any obstacle to any wireless cable operator's having requested, through the ITFS applicant or licensee, a protected service area. Moreover, adoption of HITN's proposal is not necessary to eliminate the abuse complained of. With the adoption of a window filing process, the problem we identified in the *Notices,* of existing licensees filing minor change applications creating mutually exclusive situations with pending applications, will be eliminated. The window filing process will prevent the identification of pending applications that could be obstructed by the licensee's filing of such minor change application, and further ensure that the submission of a protected service area request is principally motivated by the licensee's desire to enhance or expand its own system.

51. Only one commenter expressed opposition to the proposed specific application of the rule involving mutual exclusivity. With regard to the proposed exception advanced by RuralVision, we shall adopt it in part. We agree that there is no public interest benefit in protecting an uninhabitable area. To do so would needlessly restrict neighboring facilities, unduly depriving the area of both ITFS and wireless cable programming. Thus, if an applicant shows that interference will occur solely over water, we shall not consider the applications to be mutually exclusive. However, in order to avoid future conflicting interpretations and confusion, we will not extend the exception to cover any area in which no subscribers or potential subscribers would be affected by the interference.

52. We decline to adopt RuralVision's proposal that two applications not be considered mutually exclusive if less than five percent of one applicant or licensee's protected service area will receive interference from the other's facilities. We find no support in the record for diminishing the protection we have afforded excess capacity lessees as an incentive for them to construct viable ITFS and wireless cable facilities. Moreover, we find only minimal countervailing public interest benefits in the proposal. While some additional facilities might be constructed, many viewers could be deprived of the quality reception that the

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[73] Some commenters request a redefinition of the protected service area. However, discussion of that issue would be inappropriate, because it is already under consideration in another proceeding. *See Report and Order* in Gen. Docket No. 90-54, 5 FCC Rcd 6410 (1990), *recon. granted on other grounds,* 6 FCC Rcd 6764 (1991), *petition for recon. pending.*

[74] Educational Parties Further Comments at 19.

[75] United States Interactive and Microwave Television Association Further Reply at 3.

[76] Central Texas Further Comments at 8-9; Heartland Further Comments at 10-11; RuralVision Further Comments at 10-11.

[77] HITN Further Comments at 9-10.

[78] United States Interactive and Microwave Television Association Further Reply at 3.

[79] RuralVision Further Comments at 10-11; WCA Further Comments at 18-19.

[80] RuralVision Further Comments at 10-11.

[81] WCA Further Reply at 17, citing *Family Entertainment Network, Inc.,* 9 FCC Rcd 566, 567 (1994).

[82] Heartland Further Comments at 11; HITN Further Comments at 10.

[83] HITN Further Comments at 10.

Commission has always held as a standard. Indeed, the emerging wireless cable industry is less likely to successfully compete with cable if subscribers cannot enjoy the highest quality reception reasonably possible.

53. Finally, we decline to adopt the proposals automatically to grant protected service areas to all current licensees, all current applicants, and all future applicants. As noted above, applicants and licensees have had no obstacle to requesting a protected service area on their own. We also shall not automatically grant protected service areas in the future, as such protection may in fact not be desired or utilized by the applicant. We are also changing our application form and expressly asking whether the applicant seeks this protection. This will further expedite processing.

**Receive Site Interference Protection**

54. *Proposal.* The Commission's rules currently provide interference protection to an educator's receive sites, regardless of their distance from the transmitter. The *Further Notice* cited instances in which interference protection was requested for receive sites apparently beyond an educational institution's reasonable coverage area. We stated in the *Further Notice* that such requests could be an abuse of our processes, designed to artificially increase the service area of the wireless cable lessee. We also opined that eliminating this practice would significantly increase the efficiency of our processing of applications, thereby hastening service to the public.

55. We tentatively concluded that an educational institution is generally unlikely to reasonably serve a receive site located more than 35 miles from the transmitter. Thus, absent a showing of unique circumstances, we proposed to protect only those receive sites 35 miles or less from the transmitter. Further, we proposed that an applicant not be able to claim basic eligibility for a license by use of any receive site more than 35 miles from the transmitter.[84]

56. *Comments.* The commenters are nearly evenly divided on whether to adopt the 35-mile standard for receive site interference protection. Opponents argue that the mileage standard is arbitrary, not reflecting that educators may legitimately serve sites beyond 35 miles from the transmitter, especially in rural areas.[85] ACS, WCA, and HITN propose that all receive sites within the protected service area should automatically be protected.[86] HITN would deny protection to any receive site outside the protected service area, asserting that this clear demarcation would deter abuse.[87] Several other commenters, however, argue that any receive site that can in fact be adequately served should be eligible for receive site interference protection, regardless of location.[88]

57. In contrast, the 35-mile standard was supported by several commenters,[89] many of whom would also incorporate the interference test. They propose automatic interference protection for receive sites within the 35-mile limit, and a rebuttable presumption that farther receive sites cannot adequately be served. An applicant demonstrating otherwise would receive interference protection for the particular site in question.[90] Central Texas advocates that the Commission not authorize new receive sites for applicants unless they have already placed their facilities into operation. It alleges that such a restriction would deter parties from abusively applying for receive sites solely to prevent legitimate operators from expanding.[91]

58. Our second proposal, regarding basic eligibility through receive sites located more than 35 miles from the transmitter, was directly addressed by only two commenters. Vermont Wireless expresses its support for the proposal as put forth in the *Further Notice*.[92] RuralVision, however, advocates not allowing an applicant to use such a receive site to establish its basic eligibility unless it has demonstrated that it can adequately serve that site. The commenter also supports a similar requirement for receive sites that are used for tie-breaking purposes.[93]

59. *Discussion.* With regard to the 35-mile proposal, we acknowledge the concerns of some commenters that educators may at times serve receive sites beyond the proposed boundary. We also acknowledge RuralVision's statement that schools in rural areas are frequently more than 35 miles apart. It is true that an educator might indeed be able to serve two sites more than 35 miles apart. In fact, however, under the proposed rule, a licensee could protect two receive sites that were as far as 70 miles apart, depending on the location of the transmitter. Thus, we find that the 35-mile standard is not unduly restrictive, and we adopt the proposal as it regards both interference protection and basic eligibility for receive sites not more than 35 miles from the transmitter. However, we will waive the rule for a particular site if an applicant can demonstrate that it is located within the educator's reasonable coverage area.

60. We next address an issue raised by one of the commenters in relation to the four-channel rule: how to justify defining a service area as 35 miles in one context, and 20 miles in another. Significantly, the two rules have differing purposes. The four-channel rule addresses the facility's general service area, i.e., the area within which an educator can reasonably expect the substantial majority of its receive sites to be located. In contrast, our receive site interference rules concern a different and much smaller set: only the farthest sites that an educator generally and reasonably can expect to be protected. By definition, they involve more distant sites, and therefore a larger area that subsumes the general service area. Accordingly, the mileage

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[84] *Further Notice* at 3352.

[85] ACS Further Comments at 14; CSU Northridge Further Comments at 2; RuralVision Further Comments at 12-13; WCA Further Comments at 37-39.

[86] WCA supports a rebuttable, rather than absolute, presumption that such receive sites can be adequately served. Also, WCA's suggestion assumes the adoption of its proposed redefinition of the protected service area, discussed above. WCA Further Comments at 37-39.

[87] HITN Further Comments at 10.

[88] North American Catholic Further Comments at 4; WCA Further Comments at 37-39; RuralVision Further Comments at 12-13; ACS Further Comments at 14.

[89] *E.g.*, Vermont Wireless Co-operative (Vermont Wireless) Further Comments; Educational Parties Further Comments at 19-20; Central Texas Further Comments at 9.

[90] American Telecasting Further Comments at 13-14; Hardin Further Comments at 3; Heartland Further Comments at 11; Educational Parties Further Reply at 5-6.

[91] Central Texas Further Comments at 9.

[92] Vermont Wireless Further Comments.

[93] RuralVision Further Comments at 13.

standard is greater for the receive site interference protection rule than for the four-channel rule. As the purposes of the two rules are unrelated, the standards used to define an area of operation are also unrelated.[94] Turning to more specific applications of the rule, we decline to adopt Central Texas' proposal not to authorize any new receive site unless the applicant has already placed its facilities into operation. This would place a significant obstacle to an educator and a newly formed wireless cable operator with which it may be associated, as they might lack the funds to fully implement a competitive MDS system.[95]

**Major Modifications**

61. *Proposal.* We turn now to our proposal to reclassify certain types of modifications to existing ITFS facilities. As stated in the *Further Notice*, we have classified these as either major or minor, attaching different procedural rules to each. In the *Further Notice*, we expressed our belief that our consideration of certain changes as minor does not realistically take into account the impact that they would have on the facilities in question, nearby facilities, or proposed facilities.[96]

62. Consequently, we proposed to reclassify as a major change any application involving: (1) any polarization change; (2) the addition of any receive site that would experience interference from any licensee or applicant on file prior to the submission of the application; (3) an increase in the EIRP in any direction by more than 1.5 dB;[97] (4) an increase of 25 feet or more in the transmitting antenna height; or (5) any change that would cause interference to any previously proposed application or existing facility. We additionally proposed to formalize our policy of considering proposals to relocate a facility's transmitter site by ten miles or more as a major change. We asked whether, by limiting the opportunity to file the above types of applications to open window filing periods, adoption of the proposal would diminish an educator's flexibility to respond to changing needs and circumstances. We also stated our belief that the change in definitions would make our classification of changes more consistent, enhancing the efficiency of the window filing system. Finally, we proposed to exempt from the new rule any change that would resolve mutually exclusive applications without creating new frequency conflicts.[98]

63. *Comments.* Most of the commenters that addressed this issue generally supported the proposal. HITN and the Educational Parties, however, did not support the proposal, stating that the changes would slow the licensing process because currently-permitted modifications would have to be filed during a window. The Educational Parties oppose making polarization changes that eliminate interference as a major change. Many of the commenters who supported the reclassifying of amendments suggested that we adopt the rules contained in Sections 21.41 and 21.42 of the Commission's MDS rules, 47 C.F.R. §§ 21.41, 21.42. The supporting comments assert that the adoption of the MDS modification rules would be desirable, due to the technical and regulatory relationship that exists between the two services.

64. *Discussion.* Our experience, as supported by many of the comments, warrants the need to modify the current classification system to increase processing efficiency. We do not believe that the reclassification of certain amendments as major will diminish processing efficiency, as claimed by HITN and the Educational Parties. These amendments are being reclassified precisely because their submission outside a window would likely impede processing, due to their potential effect on the facilities in question, nearby facilities, or proposed facilities. Also, adoption of the MDS classification system would not be appropriate. Its definition of a major change is significantly broader than that previously used or now adopted for ITFS. However, the MDS rolling one-day filing window is structured to accommodate such an expansive definition, and it does not significantly restrict the submission of applications to change existing facilities. The ITFS window filing system, on the other hand, is not compatible with such an expansive classification that would needlessly restrict the filing of many ITFS technical modifications. Thus, we shall classify as major any application involving: (1) any polarization change; (2) an increase in the EIRP in any direction by more than 1.5 dB; (3) an increase of 25 feet or more in the transmitting antenna height; and (4) relocation of a facility's transmitter site by ten miles or more. We shall, however, accept such applications at any time, if their grant would resolve mutually exclusive applications without creating new conflicts. Adoption of the proposal will significantly expedite the processing of ITFS applications.

65. We do not incorporate into the new rule two types of changes that we had earlier listed: (1) the addition of any receive site that would experience interference from any licensee or applicant on file prior to the submission of the application; and (2) any change that would cause interference to any previously proposed application or existing facility. By eliminating the cut-off system, the window filing system will prevent parties from requesting changes that are mutually exclusive with a tendered but not yet cut-off application.

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[94] We note the similarity to the broadcast multiple-ownership rules in this respect. The duopoly rules are concerned with common station ownership within the same service, and they define an area of operation by use of frequency contours. 47 C.F.R. § 73.3555(a) and (b). In contrast, the one-to-a-market rule addresses common ownership between separate services, television and radio, and its definition of an area of operation is based on commercial markets. 47 C.F.R. § 73.3555(c).

[95] Hardin and Heartland propose requiring an educator to initiate service to any protected receive site beyond the 35-mile boundary within a specified period of time, in order to prevent abuse. Hardin Further Comments at 3; Heartland Further Comments at 11. However, when we receive the required certification of construction from the ITFS licensee, we expect that it applies to the facilities as authorized, i.e., all receive sites. If, however, an applicant has abandoned its intent to use a receive site, we expect it to inform us in a timely manner. The deletion of a receive site will no longer require prior Commission approval.

[96] *Further Notice* at 3352-53.

[97] Thus, total power output (TPO) would no longer be the deciding factor in determining whether a change is major.

[98] Section 22.23(g)(2) of the Commission's Rules, 47 C.F.R. § 22.23(g)(2), has a similar exception for the resolution of mutually exclusive applications in the Public Mobile Service.

**Reasonable Assurance of Receive Sites**

66. *Proposal.* The *Further Notice* requested comment on how best to ensure the accuracy of each applicant's list of receive sites. We seek to deter applicants from listing receive sites that have in fact not agreed to participate in the proposed ITFS system. We therefore proposed requiring a letter of assurance from the applicant, listing each receive site's contact person, title, and telephone number. We also asked if we should decline to consider any proposed receive site that lacked such adequate assurance.[99]

67. *Comments.* ACS supports the proposal, stating that the applicant's letter should also contain other information. For example, if an applicant is relying on the accreditation of its receive sites for its basic eligibility, the letter should supply supporting accreditation information. According to ACS, the letter could also contain enrollment information for potential tie-breaking purposes.[100] RuralVision proposes that a school district submit one letter for all the schools within its jurisdiction, listing each school individually. However, RuralVision claims that schools may be more hesitant to sign a letter that they fear will lock them into a commitment, thereby causing them to miss the opportunity to receive ITFS programming. Thus, it proposes that a school be allowed to assert simply its interest in, not necessarily its commitment to, participating in the ITFS system.[101] In this regard, it alleges that the Commission's Rules would continue to protect the receive site's right to change its mind as to its participation, regardless of the letter's wording.[102] North American Catholic advocates the same standard, but applied only to businesses, libraries, and other institutions not relevant to eligibility or tie-breaking.[103] WCA opposes altogether the modified standard proposed by RuralVision, focusing instead on receive site interference protection. According to the commenter, the public interest would be disserved if the Commission precluded an applicant's potential service solely to protect a receive site that might not even use ITFS programming.[104]

68. Most interested commenters support a stricter requirement than we proposed. They argue that for adequate deterrence, we should require a verification letter from an authorized official of each receive site listed in an application.[105] Most of these commenters generally envision each letter to contain the information described in the *Further Notice:* the receive sites' contact people, titles, and telephone numbers.[106] WCA, for example, avers that the letter should confirm that formal educational programming will be viewed at the receive site by students enrolled in for-credit courses offered by a specifically identified accredited institution. For each such institution, WCA adds, the application should provide the accrediting body and date of accreditation.[107]

69. Only two commenters oppose the proposal in any form. HITN claims that the requirement would be superfluous, because nonlocal applicants already have to submit commitment letters on accredited school letterhead, showing the school's commitment to be a receive site.[108] The Educational Parties contend that compiling a single list would impose an undue paperwork burden on applicants. Instead, they argue, the Commission should declare that it considers the listing of receive sites as a representation that those sites have been contacted and have agreed to participate, or, in the alternative, are under the jurisdiction of an authority that can mandate their participation. Under this proposal, petitioners would bear the burden of demonstrating otherwise. The commenter states that many receive sites are work places or public locations (such as libraries or hospitals) whose participation consists only of installing ITFS equipment and letting people watch, instead of formally committing to incorporate ITFS into instructional or educational programs.[109]

70. *Discussion.* To better ensure the accuracy of receive site lists submitted both by local and nonlocal applicants, we adopt a modified version of the proposal. Because the submission of commitment letters by nonlocal applicants does not encompass all the situations with which we are concerned, we reject HITN's assertion that the proposal is superfluous. Processing efficiency will be enhanced because the additional data would allow for rapid confirmation of a site's participation. However, requiring a separate letter of verification from each receive site would involve the submission of not one letter, but potentially dozens of separate letters. We believe, though, that we can expedite processing to the same degree through the application form itself, rather than by separate attachments. Therefore, on the application form, where we already ask for information about each of the applicant's receive sites, we shall simply add a column asking for a contact person's name, title, and telephone number. The contact person should be the person (or one of the people) responsible for implementation of the ITFS program at that receive site.

71. We also will not adopt the modified standard of assurance suggested by RuralVision. Our goal is to ensure the availability of the receive sites that are associated with the applications being processed. The public interest is not served by the processing of applications in which we have no reasonable assurance that the receive sites have indeed agreed to participate in the ITFS system.

**Accreditation of Applicants**

72. *Proposal.* While applicants seeking to construct a new ITFS station must indicate their accreditation or that of the schools or other institutions that intend to utilize the pro-

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[99] *Further Notice* at 3353.

[100] ACS Further Comments at 17-18. North American Catholic, which would impose a stricter rule than proposed, agrees that the letter should contain such additional data. North American Catholic Further Reply at 3.

[101] North American Catholic supports this modified standard, but only for libraries and businesses. North American Catholic Further Reply at 3.

[102] RuralVision Further Comments at 15-16.

[103] North American Catholic Further Reply at 3.

[104] WCA Further Reply at 14-15.

[105] American Telecasting Further Comments at 13-14; Central Texas Further Comments at 9-10; Hardin Further Comments at 1; National Micro Vision Further Comments at 3; RuralVision Further Comments at 14-17; WCA Further Comments at 36-37; North American Catholic Further Reply at 3.

[106] National Micro Vision also proposes that we develop a tracking system to verify that each receive site is actually utilized as pledged. National Micro Vision Further Comments at 3. We believe that the rules we are adopting today provide adequate safeguards against potential fraud to make such a precaution unnecessary.

[107] WCA Further Comments at 36-37.

[108] HITN Further Comments at 5.

[109] Educational Parties Further Comments at 22-23.

posed ITFS service, we noted in the *Further Notice* that the extent to which the specified receive sites are being utilized by students from accredited institutions is not called for. Accordingly, we proposed to require applicants to state whether and by whom each listed receive site is accredited. We also asked whether having only one proposed receive site out of many as accredited defeats the fundamental purpose of ITFS: to serve the educational needs of accredited institutions. Thus, we invited commenters to address whether we should require a majority of receive sites to be accredited in order for the application to be grantable, or if we should deny interference protection for any unaccredited receive site.[110]

73. *Comments*. The proposed changes are generally opposed by the commenters. Many of them argue that receive sites are increasingly being used for distance learning without regard to whether they are accredited. According to these commenters, such distance learning gives more people, including students enrolled in accredited courses, greater access to the educational programming transmitted by the ITFS facilities.[111] CSU Northridge, for example, claims that it utilizes hospitals, fire stations, and military bases as receive sites where students go for distance learning.[112] Also, RuralVision argues that because some states have higher fees than others for private accreditation of schools, mandatory accreditation of receive sites would unfairly deprive many smaller private schools of the opportunity to receive educational programming.[113]

74. According to HITN, the purpose of ITFS is not to serve the educational needs of accredited institutions, as we stated in the *Further Notice*, but simply to educate. Thus, as long as one of the applicant's receive sites is accredited, the commenter continues, the accreditation of any of the others is irrelevant.[114] The Educational Parties propose that as long as the party offering the programming (not necessarily the licensee) is accredited, offers credit for some of its programming, and enrolls students that are able to take courses at listed receive sites, the accreditation of those receive sites is irrelevant.[115] Even those commenters that do not oppose obtaining more detailed accreditation information urge the Commission not to use such information to affect the substantive rights an applicant or licensee might have.[116] ACS, for example, alleges that the Commission can address its concerns regarding receive site legitimacy through the proposed letters of assurance, discussed above.[117] Finally, WCA advocates the existing standard, i.e., that the only receive sites that should have interference protection are those where formal educational programming is viewed by students enrolled in for-credit courses offered by accredited institutions.[118]

75. *Discussion*. The record does not demonstrate that serving one accredited receive site among other unaccredited receive sites is incompatible with serving the formal, for-credit educational needs of students enrolled at accredited institutions, and we therefore decline to adopt either proposal. To do otherwise would artificially restrict those enrolled students' accessibility to formal ITFS educational programming, while depriving others of worthwhile programming, such as in-service training and instruction in special skills and safety programs. As most commenters note, while the essential purpose of the ITFS service is to provide formal educational programming to students enrolled in accredited schools, colleges and universities, the Commission has long recognized the value of transmitting "other visual and aural educational, instructional and cultural material to selected receiving locations. . ." 47 C.F.R. § 74.931(a)-(b). We find no evidence on the record that persuades us to now significantly alter the existing relationship between the provision of formal, for-credit educational ITFS programming and the offering of other educational, instructional, and cultural material. Indeed, we reaffirm our commitment to our longstanding objective, one that permits ITFS licensees to transmit educational and cultural programs for use in other than a classroom setting or to persons other than students enrolled at accredited institutions. However, we take this opportunity to modify and make clearer our requirements regarding the need for further specification with respect to the accreditation of the parties utilizing the proposed ITFS services.

76. To attain eligibility, an ITFS applicant must, among other things, be accredited in its own right and serve its own students or serve accredited institutional or governmental organizations. It has come to our attention that some applicants accredited in their own right propose service only to receive sites which will not be used by their own students. Such applicants do not satisfy the eligibility requirements. They must, therefore, as Item 3 of Section II in the FCC Form 330 now requires, indicate the name of the "school/institution" it will serve, the accreditation date and the accrediting agency or organization. However, we have found, in processing applications, that the name of the school or institution often does not match with any receive site specified in Section VI of the Form 330. For ease of processing, we shall require, for applicants accredited in their own right and serving their own students, to identify in Section II, Item 3(a), the receive sites in Section VI which fall under their jurisdiction. For other applicants, that is, those which are accredited and not serving their own students and those applicants which are unaccredited and establishing their eligibility by serving accredited institutions, we shall require that they specify in Section II, Item 3(b), the receive sites belonging to or being used by the accredited institution. This additional information will enable the staff and all interested parties to immediately determine the accreditation status of an applicant.

**Other Proposals**

77. *Offset*. The *Further Notice* proposed requiring the use of offset when all affected transmitters are capable of handling frequency offset stability requirements. This proposal is supported by most of the commenters. However, we believe that voluntary agreements to utilize frequency off-

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[110] *Further Notice* at 3353-54.

[111] *E.g.*, ACS Further Comments at 18; Educational Parties Further Comments at 23-24; American Telecasting Further Comments at 14-15; WCA Further Comments at 34-36; North American Catholic Further Comments at 6-7.

[112] CSU Northridge Further Comments at 2.

[113] RuralVision Further Comments at 17-18.

[114] HITN Further Comments at 10-11.

[115] Educational Parties Further Comments at 23-24.

[116] ACS Further Comments at 18; American Telecasting Further Comments at 14-15.

[117] ACS Further Comments at 18.

[118] WCA Further Comments at 34-36.

sets better serve the public interest. The use of frequency offsets represents a balancing of the need to prevent co-channel interference with our desire to allow an increase in the number of stations in a geographic area. As such, frequency offsets are not a substitute for the standard of interference protection, a desired-to-undesired signal ratio of 45dB, that our technical rules are designed to ensure. Indeed, the efficacy of frequency offsets, which is not universally acclaimed by the engineering society, is largely determined by the exigencies of the situation at hand, requiring affected applicants and licensees to engage in cooperative efforts to construct and adjust their respective technical operations to successfully avail themselves of this engineering technique, if possible. Under these circumstances, we are not persuaded to require the mandatory specification of frequency offsets.

78. *Expedited Consideration of Applications*. In the *Further Notice*, we asked for comments on the Educational Parties and WCA's proposal that we expedite consideration of certain ITFS applications in return for the applicant's agreeing to an accelerated construction schedule.[119] The stated purpose was to rapidly authorize facilities that would most likely become part of an operating wireless cable system. Most commenters are supportive of the proposal,[120] although they disagree on the details of its implementation. Opponents of expedited consideration argue that it would not in fact accelerate the construction of viable MDS systems, because processing the likely high number of requests would delay service to the public. We agree. Rapid authorization of ITFS facilities is essential to providing unique educational programming to greater numbers of people, and to accelerating the ability of MDS systems to compete with wired cable operators. The more rapid processing sought by the commenters will likely be achieved by implementation of the filing window, as enhanced by the proposed electronic filing and processing system and the other modifications adopted in this proceeding. Hence, we do not believe that adoption of the commenters' proposal is warranted.

79. *FAA Authorization*. As mentioned in the *Further Notice*, we do not grant or modify a license until the Federal Aviation Administration (FAA) has determined that the proposed transmitter site and receive sites will pose no hazard to air navigation.[121] To prevent needless delay in processing, applications, we proposed to require applicants to inform the Commission of the FAA's determination.[122] The record clearly supports our belief that enactment of this policy would speed processing at minimal cost to applicants. Therefore, to expedite processing, we require applicants to inform the Commission of the FAA's determination on a timely basis.

80. *Interference Studies*. The *Further Notice* noted that applicants frequently make technical claims that lack adequate supporting data. To address this problem, we proposed requiring the submission of terrain profiles and a quantitative analysis of any additional signal loss calculated by using the Longley-Rice propagation model, Version 1.2.2, in the point-to-point mode.[123] Most of the commenters that addressed this issue generally supported the proposal. In addition, most advocate various exceptions to the rule, allowing the use of less rigorous models under a variety of circumstances.[124] Two commenters oppose the required use of the Model altogether.[125]

81. Based on the information before us, we shall not adopt the proposal. The record demonstrates that our concern will be met by the submission of any valid profile maps or sufficient data that takes terrain shielding into account and supports the validity of each claim, regardless of whether the study involves the Model. Also, for each instance where terrain shielding is relied upon to protect ITFS facilities, applicants will be required to submit the quantitative amount of signal attenuation, in dB, attributable to terrain shielding. Any study must use generally acceptable engineering practices, and applicants must state the specific model they have used in their analysis.

82. *Construction of Facilities*. Some commenters express concern that the Commission has extended construction periods for parties with no intention to construct. Hence, they request strict guidelines for granting such extensions. National Micro Vision proposes decreasing the period within which an ITFS licensee must construct its facilities from 18 months to 12 months. The commenter alleges that, if its proposal were adopted, frequency speculators would quickly lose their licenses and their channels would consequently become available during the next window.[126] In both cases, however, our existing rules already address these matters. We have set forth the requirements an educator must meet in order to obtain an extension of time within which to construct: (1) construction is complete and testing of the facilities has begun; (2) substantial progress has been made; or (3) reasons clearly beyond the applicant's control, which applicant has taken all possible steps to resolve, have prevented construction.[127] We have no specific evidence that these rules have not operated sufficiently to prevent abuses by frequency speculators. Therefore, we decline to modify the period of time to construct.

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[119] *Further Notice* at 3351. A licensee utilizing offset operates at a frequency either slightly higher or slightly lower than the standard frequency for that channel. Specifically, such a licensee operates its facilities with a carrier frequency within 10 kHz of the nominal carrier frequency.

[120] The Educational Parties, who originated the proposal, are an exception.

[121] Section 17.4 of the Commission's Rules, 47 C.F.R. § 17.4.

[122] *Further Notice* at 3353.

[123] Longley, A. G. and P. L. Rice, "Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain: A Computer Method," ESSA Technical Report ERL 79-ITS 67, Institute for Telecommunications Sciences, July, 1968.

[124] *E.g.*, ACS Further Comments at 17; Educational Parties Further Comments at 22; WCA Further Comments at 43-44; North American Catholic Further Reply at 3.

[125] North American Catholic Further Comments at 5; National Micro Vision Further Comments at 2-3.

[126] National Micro Vision Further Comments at 1.

[127] Section 73.3534(b) of the Commission's Rules, 47 C.F.R. § 73.3534(b), addresses this issue in the television broadcast service. Pursuant to Section 74.910 of the Commission's Rules, 47 C.F.R. § 74.910, we subject unbuilt ITFS facilities to the same requirements.

## CONCLUSION

83. Over the past decade, the Commission has actively endeavored to find new and innovative ways to encourage educational institutions to develop working ITFS systems. At the same time, we have sought to facilitate the rapid development of robust wireless cable systems that can vigorously compete in the rapidly expanding video marketplace. The substantial increase in the number of tendered ITFS applications over the past several years[128] demonstrates that our policies regarding excess capacity leases have effectively served both goals. The window filing system and the other changes we have adopted today represent further steps that will encourage and allow both ITFS and MDS to reach their full potential.[129]

## ADMINISTRATIVE MATTERS

### A. Regulatory Flexibility Analysis

84. The Commission's Final Regulatory Flexibility Analysis for this *Report and Order* is set forth in Appendix A.

### B. Ordering Clause

85. IT IS ORDERED that this *Report and Order* IS ADOPTED.

86. IT IS FURTHER ORDERED that, pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 C.F.R. § 74 IS AMENDED as set forth below. The change to the rules adopted in this *Report and Order* will become effective upon approval of the Office of Management and Budget of a modified FCC Form 330 to effectuate the modifications approved in this *Report and Order*.

87. IT IS FURTHER ORDERED that MM Docket No. 93-24 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### A. List of Commenters

#### COMMENTS

ACS Enterprises, Inc., Cablemaxx, Inc., Multimedia Development

Corp., Rapid Choice TV, Inc., Superchannels of Las Vegas, Inc., and Wireless Holdings, Inc.

American Council on Education, Arizona Board of Regents for Benefit of the University of Arizona,

California State University-Sacramento, Instructional Telecommunications

Consortium of the American Association of Community Colleges, Kirkwood Community

College, South Carolina Educational Television Commission, St. Louis Regional Educational and Public Television Commission, State of Wisconsin - Educational Communications Board, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation

American Telecasting, Inc.

CAI Wireless Systems, Inc.

California State University, Northridge

Central Texas Wireless TV, Inc.

Hardin and Associates, Inc.

Heartland Wireless Communications, Inc.

Hispanic Information and Telecommunications Network, Inc.

National Micro Vision Systems, Inc.

North American Catholic Educational Programming Foundation, Inc., Network For Instructional TV, Inc., and Shekinah Network

Pioneer Telephone Cooperative, Inc.

RuralVision South, Inc. and RuralVision Central, Inc.

Vermont Wireless Co-operative

Wireless Cable Association International, Inc.

#### REPLY COMMENTS

ACS Enterprises, Inc., Cablemaxx, Inc., Multimedia Development Corp., Rapid Choice TV, Inc., Superchannels of Las Vegas, Inc., and Wireless Holdings, Inc.

American Council on Education, Arizona Board of Regents for Benefit of the University of Arizona, California State University - Sacramento,

Instructional Telecommunications Consortium of the American Association of Community Colleges, Kirkwood Community College, South Carolina Educational Television Commission, St. Louis Regional Educational and Public Television Commission, State of Wisconsin - Educational Communications Board, University of Maine System, University of Wisconsin System, and University System of the Ana G. Mendez Educational Foundation

American Telecasting, Inc.

Hardin and Associates, Inc.

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[128] *See Notice* at 1276.

[129] Until the effective date of this order, we will continue the present filing restrictions in effect and accept applications for major changes to existing ITFS facilities and applications relying on NTIA funding.

Heartland Wireless Communications, Inc.

North American Catholic Educational Programming Foundation, Inc., Network For Instructional TV, Inc., and Shekinah Network

United States Interactive and Microwave Television Association

United States Wireless Cable, Inc.

Wireless Cable Association International, Inc.

Wireless Holdings, Inc.

**INFORMAL REPLY COMMENTS**

Hammett & Edison, Inc.

**B. Final Regulatory Flexibility Analysis**

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

1. *Need and purpose of this action:* The actions taken in this *Report and Order* are intended to improve ITFS and wireless cable service by making the regulations that govern applying for a new or modified ITFS facility consistent with the continuing evolution of the telecommunications industry.

2. *Summary of issues raised by comments in response to the Initial regulatory Flexibility Analysis:* No comments were received in response to the Initial Regulatory Flexibility Analysis.

3. *Significant alternatives considered and rejected:* We considered both maintaining the existing cut-off system and excluding applicants not leasing their excess capacity from the window requirements, before adopting the policies and rules set forth in this *Report and Order*. The first option would require duplicative processing of applications and would not allow the Commission to control the flow of applications, thereby continuing the significant applications backlog. The second option would be difficult to enforce and, if successfully enforced, would impose unacceptable burdens on educational institutions. We also considered detailed financial disclosure requirements, application caps, technical requirements to determine four-channel limitations, and a continued separation between receive site interference protection and distance from the transmitter. Adoption of these options would diminish processing efficiency or otherwise impede the continued growth of MDS and ITFS systems.

**APPENDIX B**

**Rules**

Part 74 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 74 – EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST DISTRIBUTION SERVICES

1. The Authority Citation for Part 74 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. Section 74.902 is amended by revising the second sentence of paragraph (d) to read as follows:

§ 74.902 Frequency assignments

* * * * *

(d) * * * A licensee is limited to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same Group listed in paragraph (a) of this section. An area of operation is defined as the area 20 miles or less from the ITFS transmitter. * * *

3. Section 74.903 is amended by adding a new paragraph (a)(5), by adding a final sentence to paragraph (e), and by adding a new paragraph (f), to read as follows:

§ 74.903 Interference

(a) * * *

(5) No receive site more than 35 miles from the transmitter shall be entitled to interference protection.

* * * * *

(e) * * * Such protection shall be applied solely with regard to applications filed subsequent to the request for a protected service area.

(f) With respect to protected service area proposals, two applications will be regarded as mutually exclusive if they are: h),(1) submitted during the same filing window; (2) otherwise grantable; and (3) mutually exclusive only because either or both applicants request a protected service area. However, if an applicant in such a situation shows that the resulting interference would occur solely over water, the applications will not be considered to be mutually exclusive.

4. Section 74.910 is amended by deleting the entry regarding Section 73.3564(a),(b) Acceptance of applications, and adding in its place, 73.3597(c)(2) Procedures on transfer and assignment applications.

5. Section 74.911 is amended by revising the third sentence of paragraph (a)(1), and by revising paragraph (c) in its entirety, to read as follows:

§ 74.911 Processing of ITFS station applications

(a) * * *

(i) * * * A major change for an ITFS station will be any proposal to add new channels, change from one channel (or channel group) to another, change polarization, in-

crease the EIRP in any direction by more than 1.5dB, increase the transmitting antenna height by 25 feet or more, or relocate a facility's transmitter site by 10 miles or more. * * *

* * * * *

(c) New and major change applications for ITFS stations will be accepted only on dates specified by the Commission. Filing periods will be designated by the Commission in a Public Notice, to be released not fewer than 60 days before the commencement of the filing period. Qualified parties will have no fewer than 5 business days within which to submit their applications. After termination of the filing period, the Commission shall release a Public Notice with a list of applications filed in the window and provide no fewer than 30 days for the submission of petitions to deny. Uncontested applications that are not mutually exclusive with any other application or licensed facility, and are found to be acceptable, shall be granted. Mutually exclusive applications shall be evaluated pursuant to the comparative selection process set forth in § 74.913 of this part, as herein amended.

(1) The requirements of this section apply to a wireless cable entity requesting to be licensed on ITFS frequency pursuant to Section 74.990. The application of such a wireless cable entity shall be included in the Public Notice released after the termination of the filing period.

6. Section 74.913 is amended by revising the first sentence of paragraph (d)(1), and adding a new paragraph (d)(5), to read as follows:

§ 74.913 Selection procedure for mutually exclusive applications

* * * * *

(d) * * *

(1) Enrollment will be considered as of the last date of the filing window during which the applications were filed, as provided by § 74.911(c) of this part. * * *

* * *

(5) A receive site not receiving interference protection may not be utilized by an applicant for tie-breaking purposes.

7. Section 74.932 is amended by adding a new paragraph (e), to read as follows:

§ 74.932 Eligibility and licensing requirements

* * * * *

(e) No receive site more than 35 miles from the transmitter site shall be used to establish basic eligibility.

8. Section 74.991 is amended by revising the final two sentences of paragraph (a) to read as follows:

§ 74.991 Wireless cable application procedures

(a) * * * A wireless cable application for available instructional television fixed service channels will be subject to § 21.914 of this chapter with respect to other wireless cable applicants, and to the ITFS window filing period with respect to instructional television fixed service applications. All lists of accepted applications for ITFS frequencies, regardless of the nature of the applicant, will be published as ITFS public notices.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI CABLEVISION, INC.

Petition for Reconsideration
of Certification of the
City of Dallas (TX0762)

## MEMORANDUM OPINION AND ORDER

**Adopted: January 30, 1995; Released: January 31, 1995**

By the Chief, Cable Services Bureau:

### I. INTRODUCTION

1. On March 14, 1994, TCI Cablevision of Dallas, Inc. ("TCI"), filed a timely Petition for Reconsideration of Certification challenging the certification of the City of Dallas ("The City" or "Dallas") to regulate the system's basic service rates in Dallas, Texas.[1] Dallas filed an objection, to which TCI filed a reply. In addition, both parties filed additional pleadings. On August 1, 1994, TCI filed a Response to the Commission's information request letter dated July 22, 1994.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective competition.[7]

### II. DISCUSSION

3. TCI argues that its system in the City of Dallas is subject to effective competition because it serves fewer than 30 percent of the households in the City of Dallas, its franchise area.[8] In its initial submission, TCI claimed that it served only 124,635net basic subscribers[9] of the 437,136 households (that is, occupied housing units)[10] in the City of Dallas, or 28.51 percent of the total number of households. As supporting documentation, TCI provided household data prepared by Claritas, which asserted that there were 437,136 households in the City of Dallas, the franchise area.[11] TCI also provided a signed declaration from the Executive Vice President, Scott Hiligel, regarding subscriber information.

4. Dallas disputed the household numbers presented by TCI. According to Dallas, there are 409,545[12] households in the City. Considering the 124,635 subscribers that TCI

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[1] The City of Dallas filed a Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328"), on January 13, 1994. The certification became effective on February 12, 1994.

[2] Letter from Lisa M. Higginbotham to Matthew P. Zinn, Attorney for TCI Cablevision of Dallas, (July 22, 1994).

[3] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(1)(1)(A), 47 U.S.C. § 543 (1)(1)(A); 47 C.F.R. § 76.905(b)(1).

[9] According to TCI, net basic subscribers are all subscribers to the system that must subscribe to basic service in order to receive any other level of service, such as expanded basic, premium channels, or pay-per-view. Thus, TCI claims the basic subscriber figure includes all cable subscribers in the franchise area, regardless of tier.

[10] As the Commission has stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] *See* Claritas/NPDC ("Claritas") 1993 Census TRACT Report, attached as Exhibit 1, TCI's Petition for Reconsideration. Claritas is a census and demographic's firm, which was consulted by TCI. According to TCI, Claritas creates its annual housing unit estimates at the census tract level because the 1990 Census defined the entire U.S. by census tracts, or equivalent subdivisions of counties.

[12] According to Dallas, this figure was arrived upon by using data based on the 1990 Census, updated to February, 1994, adjusting the census numbers with new construction and demolition information recorded in the City's building permit file, and factoring in occupancy rates obtained from local research.

claimed to serve, Dallas argued that the penetration rate is 30.43 percent. Therefore, Dallas believes TCI is not subject to effective competition. The City argued that TCI's statistical information is fundamentally flawed since it relied on census tracts not fully in the City and did not rely on local statistics for construction and demolition to verify the correct number of housing units and households in the City. The City stated that in calculating its household numbers, the City started with 1990 Census data, but updated the data using local statistics. Specifically, Dallas claimed that it started with the 1990 Census data which lists 465,600 "housing units" in the city in 1990. Dallas adjusted that number, to account for the changes since the 1990 Census, by adding 5,587 "housing units" derived from new construction and demolition information. Finally, the City adjusted the "housing unit" data by factoring in the occupancy rates for each housing type (i.e. single family, multifamily, etc.). According to Dallas, this analysis provides a more specific estimate of the number of "households" or "occupied housing units" in the City than does the method used by TCI because the City accounted for the changes that have occurred since the 1990 Census. According to Dallas, "while Claritas is using annual estimates based on the 1990 Census, the City is using factual, current information from its own files and the population and household size estimates of the North Central Texas Council of Governments."

5. In response, TCI acknowledged that Claritas initially had considered several census tracts containing areas with adjoining cities to be wholly within Dallas, whereas it should have used split census tracts which would account only for the households actually in the City. TCI provided occupied housing unit count numbers recalculated by Claritas, and estimated that the number of occupied housing units within the City of Dallas as of 1994 is 416,219. TCI discounted the City's household numbers, arguing that the City's approach is unreliable because it is not an accurate method of estimating housing units that may have been added since the 1990 Census. TCI argued that the demolished buildings subtracted by the City during the 1990-92 period were most likely not counted as housing units in the 1990 Census. According to TCI, the only vacant units included in the "housing units" category of the 1990 Census, are those that are intended for occupancy. In addition, TCI argued that counting building permits severely undercounts the number of housing units. For example, TCI stated that a 100 unit apartment building may be represented by only one building permit. TCI claims that, only if separate building permits were issued for each and every housing unit could building permits be equated with housing units. Furthermore, TCI claimed that even if building permits were an accurate measure of housing units, the City's methodology incorrectly subtracts demolitions from its building permit count. TCI asserted that if the demolished buildings were not housing units in 1990, they cannot now be used to adjust the housing unit count. TCI maintained its total number of subscribers to be 124,635. Therefore, TCI argued that its penetration rate is be 29.945 percent.

6. In reply, Dallas argued that since the City's boundaries are not established or created in relation to census tracts, the City, in its reply to TCI's petition, demonstrated that "by using accurate, specific information, the estimates of Claritas were factually in error." Dallas claimed that it is required by law to keep complete and exact records of its boundaries. The City stated that it keeps records of housing units as they are constructed. Responding to TCI's claim that buildings under demolition permits were already excluded by the 1990 Census, Dallas argued that TCI is inaccurate because once a demolition permit is issued the building owner must begin demolition work within 10 working days or the permit expires. Therefore, according to Dallas, it is unlikely that any housing unit considered as vacant or ready to be demolished by the 1990 Census was issued a demolition permit in 1991, 1992, 1993 or 1994. As for TCI's concern that building permits are inaccurate because, as TCI claims, one permit may be issued for a 100 unit apartment building, but show as only one unit, Dallas argued that if that were true it would undercount the number of housing units in the city. However, Dallas stated that each applicant for a building permit is required to state the number of dwelling units to be constructed. Dallas argued that, upon completion of construction, the City issues a certificate of occupancy which also indicates the number of dwelling units. Dallas stated that TCI failed to rebut the presumption of effective competition because it based its claim upon the use of inaccurate information, as evidenced by the error in the boundaries of the City.

7. In its response to the Commission's letter request,[13] TCI claimed that the number of subscribers in the franchise area, at the time Dallas certified, was actually 122,921 net basic subscribers. According to TCI, the number of net basic subscribers was determined by aggregating the basic service rate codes contained in TCI's billing report. This figure includes all individual residences in multiple dwelling units ("bulk basic units"), regardless of actual occupancy in the building. TCI did not include in the 122,921 net basic subscribers, the 341 subscribers that represent city, municipal, and school accounts. TCI also did not include 239 commercial accounts and 358 free employee accounts. TCI explained that commercial accounts were subtracted from the basic subscriber figure because nonresidential units were not counted as households in the 1990 Census. TCI also stated that free accounts, such as municipal, school, and employee accounts, were subtracted from the basic subscriber figure because these accounts do not purchase cable service. TCI asserted that this calculation yields a net basic service subscriber count of 122,921. Taking into consideration the 416,219 households that TCI now claims are in the franchise area, TCI now argues that its penetration rate is 29.533 percent.

8. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[15] TCI has not met that burden. TCI and

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[13] The Commission requested, in its information request letter to TCI on July 22, 1994, that TCI submit a copy of the data demonstrating the number of cable subscribers in the franchise area for the time at or about which the City of Dallas was certified (i.e., not more than two months before February 13, 1994). TCI responded with a copy of TCI's subscriber data as of December 31, 1993. This data showed TCI had 122,921 net basic subscribers as of that date.

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911(b)(1).

the City of Dallas have each submitted data more current than 1990 Census data to attempt to illustrate the total number of households in the City of Dallas. TCI's more recent data is based on annual estimates compiled by Claritas. The City's data is based on 1990 Census data which lists 465,600 "housing units" in the city in 1990. The City adjusts that number, to account for the changes since the 1990 Census, by adding 5,587 "housing units" derived from new construction and demolition information. Finally, the City adjusts the "housing unit" data by factoring in the occupancy rates for each housing type (i.e. single family, multi-family, etc.). According to the City, this analysis provides a more specific estimate of the number of "households" or "occupied housing units" in the City than does the method used by TCI.

9. In a previous case, we accepted estimates compiled by Claritas, as an acceptable source of household information more recent than that offered by the 1990 Census.[16] However, in that case the franchising authority did not submit alternative household data, or in any other way challenge the household estimates as compiled by Claritas. Here, the City of Dallas does challenge TCI's method of estimating the number of households in the City as determined by Claritas and submits its own more current household data. As noted above, the cable operator has the burden of rebutting the presumption that effective competition does not exist. We believe that where both the cable operator and the franchising authority submit household numbers more current than the most recent available census data, it is the cable operator's burden to demonstrate that its more current household numbers are more accurate and reliable than the household numbers submitted by the franchising authority. TCI has failed to make this showing. Specifically, although TCI's more current household numbers are based on a source which has been previously accepted as an acceptable source for more current household data, it has not convinced us that its data is a more accurate and reliable source for household numbers than the numbers submitted by the City of Dallas.

10. We further find that TCI inappropriately deducted the number of employee accounts from its number of subscribers. TCI deducted the number of its employees receiving cable service for no charge. TCI claims that such a deduction is consistent with the plain meaning of the term "subscriber" which TCI defines as a person "receiving something of a continuing or periodic nature on a prepayment plan."[17] We find this argument unpersuasive. Typically, a cable operator provides cable service in consideration for fees paid. In providing cable service to employees for no fee, TCI is merely providing cable service in consideration for services rendered by its employees. The fact that TCI chooses to provide cable services to its employees in exchange for services rendered instead of charging a fee (as it does for other customers receiving its cable service) is immaterial. Accordingly, these subscribers should have been included for purposes of determining the presence of effective competition.

11. Since we are unable to accept TCI's household numbers, as compared to those numbers submitted by the City of Dallas, we will use the household numbers submitted by the City of Dallas in calculating TCI's penetration level. In addition, we add in the number of employees receiving cable service to TCI's subscriber total.[18] Based upon the 409,545 households in the City of Dallas, as per the City's submission, and TCI's 123,279 subscribers, we find that TCI's system serving the City of Dallas serves 30.1 percent of the households in the franchise area. Accordingly, we find that TCI's system serving the City of Dallas is not subject to effective competition. Thus, its petition is denied.

## III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the petition for reconsideration filed by TCI Cablevision of Dallas, Inc. challenging the certification of the City of Dallas, Texas to regulate basic cable rates IS DENIED.

13. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

14. IT IS FURTHER ORDERED that TCI Cablevision of Dallas SHALL FILE the required rate justifications on the appropriate forms with the City of Dallas, Texas within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the franchising authority that it is regulating TCI Cablevision's rates, whichever is later.

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[16] *Insight Communications Company of New York*, DA 94-1524 (released December 19, 1994). Insight Communications Company relied upon a household trend report prepared by Claritas to calculate an estimate of the number of households in its franchise area in 1992. That data was considered by the Commission.

[17] *See* Webster's Ninth New Collegiate Dictionary at 1176 (1989).

[18] This number is arrived at by taking the 122,921 subscribers that TCI initially claimed, and adding the 358 free employee accounts.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CENTURY SOUTHWEST CABLE
TELEVISION CORPORATION

Motion to Dismiss
Appeal of Local Rate Order of
City of West Hollywood, CA

**ORDER**

**Adopted: January 30, 1995; Released: January 31, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. Century Southwest Cable Television Corporation ("Century"), the franchisee in the above matter, filed on April 8, 1994 an Appeal of Local Cable Rate Order adopted on March 7, 1994 by its local franchising authority, the City of West Hollywood, California ("the City").[1] The Rate Order establishes a new regulated rate schedule for Century's basic service tier rates and associated equipment.[2] Specifically, the City's Rate Order requires Century to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its Appeal, Century challenged the City's setting of Century's installation rates at zero. In addition, Century also challenged other aspects of the City's Rate Order: (1) the City's allocation of 100% of Century's labor cost in calculating hourly service charge; (2) the City's refusal to count certain channels in calculating Century's permitted basic rate; and (3) the City's refusal to provide Century with a copy of the Form 393 on which the City based its findings. In its Opposition, the City explained that it did not intend to establish a permanent rate of zero for Century's installations. Instead, it temporarily set Century's rates for installations at zero to encourage Century to provide the City with the data that it had repeatedly requested so that the City could determine the reasonableness of Century's installations. The City disputed Century's other claims and maintained that its determination of Century's basic service tier rates was proper.

3. On January 11, 1995, Century filed with the Commission a Motion to Dismiss Petition for Review of Rate Order. In its Motion, Century states that it "no longer wishes to pursue its appeal and hereby requests that the Commission dismiss the Petition for Review." There being no opposition, Century's Motion to Dismiss is granted.[3]

4. Accordingly, IT IS ORDERED that Century Southwest Cable Television Corporation's Appeal of the Local Rate Order of the City of West Hollywood, California is DISMISSED.

5. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] On April 19, 1994, the Commission granted a temporary stay effective until May 13, 1994 to ensure that the Commission was able to consider any opposition filings to Century's petition for stay. *See Order* (Emergency Petition for Stay of Local Rate Order by Century Southwest Cable Television Corporation against the City of West Hollywood), DA 94-382 (released April 21, 1994). On May 13, 1994, the Commission granted in part and denied in part the Emergency Petition for Stay filed by Century. The only portion of the petition that was granted involved that part of the City's local rate order setting Century's installation rates at zero. The Commission ordered the Stay to remain in effect until the City of West Hollywood prescribed rates for Century's customer-related installations. *See Order* (Emergency Petition for Stay of Local Rate Order by Century Southwest Cable Television Corporation against the City of West Hollywood), DA 94-489 (released May 13, 1994).

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] After consulting with the City of West Hollywood, Mr. Donald Stern of the law firm of Richards, Watson & Gershon called the Cable Services Bureau on January 19, 1995 to inform the Bureau that the City of West Hollywood will not oppose Century's Motion to Dismiss.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CENTURY SOUTHWEST CABLE TELEVISION
SANTA MONICA, CALIFORNIA

Appeal of Local
Rate Order of City of
Santa Monica, California

**ORDER**

**Adopted: January 30, 1995; Released: January 31, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On August 18, 1994, Century Southwest Cable Television Corporation of Santa Monica, California ("Century Southwest") filed with the Commission a Petition for Review of Rate Order ("appeal") of the local rate order ("local order") adopted by the City of Santa Monica, California (the "City").[1] In its local order, the City established Century Southwest's rates for basic cable service, equipment, installations and hourly service charges.[2] As part of this decision setting the basic tierrates, the City found that the channels contained in Century Southwest's "Century Select" package must be included as regulated channels for purposes of the local order.[3] The City ordered Century Southwest to make refunds or to credit subscribers for all payments made in excess of the rates for basic service and equipment and installations set forth in the local order for the period September 1, 1993 through July 14, 1994.[4]

2. In its appeal, Century Southwest challenges the local order on the grounds that the City did not have authority to make determinations regarding the status of a la carte packages and that, even if the City did have such authority, the City's decision to treat the channels in the a la carte package as regulated channels is contrary to the Commission's a la carte rules. The City responds that, pursuant to authority granted by the Commission, it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Century Southwest's package should be treated as regulated channels.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision. Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order. If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal. With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[6]

## II. DISCUSSION

4. Century Southwest objects to the City's finding in the local order that the channels comprising Century Southwest's a la carte services at issue in this appeal must be included as regulated channels.[7] Century Southwest argues that its a la carte package complies with the Commission's a la carte rules in effect at the time the package was created[8] and that the City erred in "retroactively applying the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status" of Century Southwest's a la carte channels.[9] Century Southwest further argues that the City has no authority to determine the regulatory status of a la carte service

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[1] Century Southwest also filed an Emergency Petition for a Stay of Enforcement Pending Review on August 18, 1994 and filed a Withdrawal of Emergency Petition for Stay on August 23, 1994. Other filings in this proceeding include an Opposition of the City of Santa Monica, California to Petition for Review of Rate Order filed by the City on September 2, 1994 and a Reply to Opposition of the City of Santa Monica, California, filed by Century Southwest on September 9, 1994.

[2] *See* appeal, Exhibit A, Resolution of the City Council of the City of Santa Monica Adopting a Rate Order Regarding Basic Service Rates and Associated Charges of Century Southwest Cable Television, Inc. and Requesting Further Information Regarding Delinquent Account Charges, Resolution No. 8781 (City of Santa Monica, California, July 19, 1994) ("Resolution").

[3] The Century Select channels are offered in a package or on an individual ("a la carte") basis.

[4] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[5] 47 C.F.R. § 76.944.

[6] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order*, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (released March 30, 1994) (*"Second Reconsideration Order"*).

[7] *See* Petition , Exhibit A, Resolution at 3-7.

[8] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order*, MM Docket 92-266, 8 FCC Rcd 5631, 5736-5838 (*"Rate Order"*).

[9] *See Second Reconsideration Order*, 9 FCC Rcd at 4214-4216. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at 4214.

offerings because its jurisdiction under the 1992 Cable Act is limited to the regulation of basic service and equipment rates.

5. The Century Southwest a la carte services at issue were first offered to subscribers on September 1, 1993, when Century Southwest restructured the service offerings on its Santa Monica system. Century Southwest states that its September 1, 1993 restructuring involved eliminating its 14 channel cable programming service tier and offering 12 channels (nine from its former cable programming service tier, two from its basic service tier, and one new channel) on an individual basis and also as a 12 channel package or two six channel packages that Century Southwest alleges are not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our letter of inquiry orders, *Century Southwest Cable TV*, Beverly Hills and Los Angeles, California, LOI-93-17, DA 94-1553 (Cab. Serv. Bur. released Dec. 22, 1994), in which we resolved the regulatory status of an la carte package offered by Century Southwest on its Los Angeles system that is essentially the same as the a la carte package at issue in this appeal.[10] Specifically, Century Southwest's Los Angeles a la carte package at issue in the *Century Southwest Cable TV* order was a 12-channel package (or two-six channel packages) that was part of a service restructuring that involved the elimination of the cable programming services tier.[11] In the *Century Southwest Cable TV* case, we found that Century Southwest's retiering on its Los Angeles system constituted an evasion of rate regulation. We therefore found that Century Southwest's Los Angeles a la carte package must be treated as a rate-regulated cable programming service tier and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of September 1, 1993.[12]

7. Century Southwest's Santa Monica a la carte package closely resembles its Los Angeles a la carte package that was the subject of our order in *Century Southwest Cable TV*. Accordingly, the regulatory status of Century Southwest's Santa Monica package at issue in this appeal should be the same. We find that the City's conclusion that the channels in Century Southwest's a la carte package must be included as regulated channels is consistent with the Commission's letter of inquiry orders, and in particular in *Century Southwest Cable TV*. Therefore, we hereby deny Century Southwest's appeal.[13]

## III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Century Southwest's a la carte package, is DENIED.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] In *Century Southwest Cable TV*, we also addressed the regulatory status of an a la carte package offered by Century Southwest on its Beverly Hills system.

[11] In its appeal, Century Southwest states that it further restructured its service offerings on April 1, 1994 to replace two channels offered in the original a la carte package, A&E and VH-1, with two channels not previously offered on the system and to offer A&E and VH-1 as part of a regulated "mini-tier" at that time. Appeal at 3. Despite this further restructuring, which occurred seven months after its initial restructuring, Century Southwest's a la carte package is still substantially similar to the package it offered on its Los Angeles system, in that it is still comprised of 12 channels, with nine of those channels coming from regulated tiers.

[12] We made these same findings with respect to Century Southwest's Beverly Hills a la carte package.

[13] Century Southwest's argument that the City has no authority to determine the regulatory status of a la carte service offerings is without merit. The City's rate order was adopted on July 19, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that "local" authorities may make any necessary 'a la carte' determination as part of their final decision setting rates for the basic tier. *Id.* at 4217. Contrary to Century Southwest's contention, this provision does not delegate the Commission's jurisdiction over cable programming service tier rates to local authorities. Rather, it allows local authorities to make an initial determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

We note that we need not address Century Southwest's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order* in light of the fact that we deny Century Southwest's appeal based on the precedent established in our letter of inquiry orders on the a la carte issue.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Columbia Cable of Michigan<br>Washtenaw County, Michigan | CUID Nos. MI0330,<br>MI0334, MI0636,<br>MI1141, MI1143 |

Benchmark Filing To Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: February 7, 1995; Released: February 9, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider complaints about the price Columbia Associates d/b/a Columbia Cable of Michigan ("Columbia") was cha ging for its cable programming service ("CPS") tier in the Washtenaw County, Michigan communities designated by the CUID numbers referenced above. Columbia has attempted to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Columbia's price only through May 14, 1994. At a later time we will issue a separate order "addressing the reasonableness of the price after that date."[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

## PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas was completed and served on Columbia and filed with the Commission as set forth in Appendix A.

5. Columbia attempted to justify its CPS price through identical FCC Forms 393 filed on November 24, 1993 for CUID No. MI0330, Ann Arbor, Michigan, and CUID No. MI0334, Ypsilanti, Michigan; on February 7, 1994 for CUID No. MI0636, Pittsfield, Michigan; on February 16, 1994 for CUID No. MI1141, Scio Township, Michigan; and on December 6, 1993 for CUID No. MI1143, Van Buren Township, Michigan.

6. On December 6, 1993, Columbia filed a Motion to Dismiss the complaint in CUID No. MI1143, Van Buren Township, Michigan. In its motion, Columbia requests that the Commission dismiss the complaint on the ground that the complainant incorrectly answered question number 8 on FCC Form 329 as it then existed. Columbia argues that the rate entered by the complainant in response to question number 8 was not being charged by Columbia for the basic tier, CPS, or any other service, and therefore it is impossible to tell if the service complained of falls within the statutory definition of cable programming service. On February 7, 1994, Columbia filed a Motion to Dismiss the complaint in CUID No. MI0636, Pittsfield, Michigan. In that motion, Columbia requests that the Commission dismiss the complaint on the grounds that the complainant incorrectly answered question numbers 8 and 9 on FCC Form 329 as it then existed in that the rate identified in response to question 8 and the services included in response to question 9 included the rate applicable to the basic service tier and channels that were sold on the basic service tier as well as the rate applicable to the CPS tier and channels that were offered on the CPS tier.

7. Columbia's assertions do not persuade us that the complaints are invalid or should be dismissed. In general, we will find valid any complaint that states a claim on

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Columbia has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Columbia implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainants' responses to question number 9 include channels contained on the CPS tier, we find it reasonable to conclude that the complainants objected to the CPS tier rate and that they believed that rate was unreasonable. We therefore find the complaints filed in CUID Nos. MI0636 and MI1143 valid and deny Columbia's Motions to Dismiss.

## DISCUSSION

8. Columbia asserts that its monthly CPS tier price of $11.36 per subscriber is justified by its benchmark filings because its price is equal to the maximum permitted charge of $11.36 as calculated in the filings. Upon review of Columbia's Form 393, we have found no apparent errors that would require a recalculation of Columbia's maximum permitted CPS price.

## CONCLUSIONS

9. Upon review of the record herein, we conclude that Columbia has demonstrated that $11.36 (plus franchise fee) was the maximum reasonable CPS tier price for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[11]

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motions of Columbia Cable of Michigan to dismiss the complaints against its cable programming service price charged in Pittsfield, Michigan, CUID No. MI0636, and Van Buren Township, CUID No. MI1143, ARE DENIED.

11. IT IS FURTHER ORDERED, that the complaints against the cable programming service price charged by Columbia Cable of Michigan in Ann Arbor, Michigan, CUID No. MI0330; Ypsilanti, Michigan, CUID No. MI0334; Pittsfield, Michigan, CUID No. MI0636; Scio Township, Michigan, CUID No. MI1141; and Van Buren Township, Michigan, CUID No. MI1143, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED, that the benchmark filings submitted by Columbia Cable of Michigan with respect to Ann Arbor, Michigan, CUID No. MI0330; Ypsilanti, Michigan, CUID No. MI0334; Pittsfield, Michigan, CUID No. MI0636; Scio Township, Michigan, CUID No. MI1141; and Van Buren Township, Michigan, CUID No. MI1143, for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A), justify a maximum price of $11.36 per month (plus franchise fee) for Columbia's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed With FCC | Date Complaint Served |
|---|---|---|
| 0330 | 10/15/93 | 10/13/93 |
| 0334 | 10/12/93 | 10/5/93 |
| 0636 | 1/18/94 | 1/10/94 |
| 1141 | 1/24/94 | 12/28/93 |
| 1143 | 11/8/93 | 11/5/93 |

[11] This finding is based solely on the representations of Columbia listed in paragraph 5, *supra* . Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI Cablevision of Scottsdale CUID No. AZ0138
City of Scottsdale, Arizona

Benchmark Filing To Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: February 7, 1995; Released: February 9, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider a complaint about the price TCI Cablevision of Scottsdale ("TCI") was charging for its cable programming service ("CPS") tier in Scottsdale, Arizona, CUID No. AZ0138. TCI has attempted to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of TCI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

## PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on TCI on September 6, 1993. The Commission received the complaint on September 13, 1993.

5. TCI attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. TCI amended its justification on four occasions: first, on December 7, 1993; second, on May 16, 1994; third, on May 18, 1994; and finally on May 31, 1994. The May 31, 1994 amended FCC Form 393 was filed in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

## DISCUSSION

6. TCI asserts that its monthly CPS tier price of $8.86 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $8.86 as calculated in its most recent amended filing, dated May 31, 1994. Upon review of TCI's May 31, 1994 amended Form 393, we have found no apparent errors that would require a recalculation of TCI's maximum permitted CPS price.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[12] We note that on Schedules A and C, Part III, FCC Form 393, TCI did not gross-up its taxes and on Worksheet 1, Part II, FCC Form 393, TCI incorrectly calculated its Inflation Adjustment Factor. Correcting these mistakes, however, does not lower TCI's maximum permitted CPS price.

## CONCLUSIONS

7. Upon review of the record herein, we conclude that TCI Cablevision of Scottsdale's showing supports a maximum reasonable CPS tier price of $8.86 per month (plus franchise fee) for the period September 13, 1993 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 6, 1993 complaint against the cable programming service price charged by TCI Cablevision of Scottsdale in Scottsdale, Arizona, CUID No. AZ0138 IS DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by TCI Cablevision of Scottsdale with respect to Scottsdale, Arizona, CUID No. AZ0138, for the period of September 13, 1993 to May 14, 1994, justifies a maximum price of $8.86 per month (plus franchise fee) for TCI Cablevision of Scottsdale's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of TCI listed in paragraph 5, supra . Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI Cablevision of Santa Fe CUID No. NM0017
Santa Fe, New Mexico

Order Denying Jurisdiction

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 7, 1995; Released: February 9, 1995**

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price TCI Cablevision of Santa Fe ("TCI") was charging for its cable programming service ("CPS") tier in Santa Fe, New Mexico, CUID No. NM0017, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation. CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. As of September 1, 1993, TCI states that in the community of Santa Fe, New Mexico, CUID No. NM0017, it only offers one tier of service.[3] The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and TCI's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision of Santa Fe, New Mexico, CUID No. NM0017, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Letter from Andrew C. Elson, TCI, to Julia C. Buchanan, FCC (Dec. 14, 1994).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 9, 1995**

**GTE PETITIONS FOR WAIVER OF PART 69 OF THE COMMISSION'S RULES**

**Pleading Cycle Established**

**COMMENTS: February 24, 1995**
**REPLY COMMENTS: March 7, 1995**

On January 6, 1995, GTE Service Corporation, on behalf of the GTE Telephone Operating Companies and the GTE System Telephone Companies (collectively GTE) filed a petition for waiver of Sections 69.110(f), 69.111(i), and 69.112(f) of the Commission's Rules, 47 C.F.R. § 69.110(f), § 69.111(i), and § 69.112(f). GTE seeks waiver of the requirement that it must attain a certain DS1-equivalent threshold before it can provide volume and term discount pricing arrangements for all of the states in which it serves with the exception of California. GTE also request that it be permitted to establish volume and term discounts for switched transport on a combined study area basis in those states in which GTE has multiple study areas but files tariffs on a combined tariff entity basis.

Interested parties may file comments on this petition for waiver no later than **February 24, 1995**. Replies should be filed by **March 7, 1995**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Mika Savir, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CECILTON CATV, INC.

Petition for Reconsideration
of Certification of
Cecil County, Maryland (MD0334)
to Regulate Basic Cable Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 8, 1995; Released: February 9, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On March 15, 1994, Cecilton CATV, Inc. ("Cecilton") filed a letter challenging the certification of Cecil County, Maryland ("The County") to regulate rates for basic cable service and associated equipment.[1] On March 31, 1994, the County filed an opposition to the letter. On May 4, 1994, Cecilton filed a pleading styled as a "petition for reconsideration." On May 18, 1994, the County filed an opposition to the "petition" to which Cecilton filed a reply. In addition, both parties submitted supplemental pleadings pursuant to the Commission's July 29, 1994 Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition as defined by the Communications Act.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to such effective competition unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition as defined by the Communications Act.[7]

## II. DISCUSSION

**Procedural Issues**

3. In its opposition to the petition for reconsideration, the County argues that Cecilton's petition was untimely and should, therefore, be dismissed on procedural grounds. Specifically, the County argues that its certification became effective on April 2, 1994; Cecilton's petition was filed on May 4, 1994, exactly thirty-two (32) days after the effective date of the County's certification. The County argues that, as Cecilton's petition was filed two days late, it should be dismissed as untimely.

4. Cecilton responds by stating that the Commission's rules are ambiguous with regard to the filing of petitions for reconsideration challenging certification. As such, Cecilton claims that the filing period commences after an event or action akin to a Commission "public notice" or release announcing the effective date of certification by franchising authorities. Despite receiving no such "notice" Cecilton argues that the filing deadline could not have occurred prior to the first business day after the expiration of 30 days following the date of the County's certification. Specifically, Cecilton claims that because the County's certification became effective on Saturday, April 2, 1994, commencement of the filing period rolls over onto the next business day or April 4, 1994. Therefore, as the filing period began on April 4, 1994, Cecilton concludes that its May 4, 1994 petition was timely. In the alternative, Cecilton argues that its March 9, 1994 letter (filed with the Commission on March 15, 1994) should constitute a petition for reconsideration while the May 4, 1994 petition should be regarded as a supplement thereto.

5. We will treat Cecilton's March 9, 1994 letter as a timely petition for reconsideration of the County's certification in this case. In so doing, we note that Cecilton's March 9, 1994 letter was clearly a challenge to the County's certification and was taken as such by the County, which filed an opposition. In light of this, we will treat the March 9, 1994 letter as a petition for reconsideration and Cecilton's May 4, 1994 filing as a supplement thereto. As such, we need not address the timeliness issues raised by the parties.

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[1] Cecil County filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on March 3, 1994. The certification became effective on April 2, 1994.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. § 76.911(c).

**Effective Competition Claim**

6. Cecilton states that its system serving Cecil County is subject to effective competition as defined by the Communications Act because the system serves fewer than 30% of the households within the unincorporated areas of Cecil County, its franchise area.[8] Specifically, Cecilton claims that it serves 1,239 of the 18,142 households (i.e., occupied housing units)[9] in its franchise area, or 6.83 percent of the total number of households. As supporting documentation, Cecilton provides 1990 Census data[10] which shows that there are 24,725 households in all of Cecil County.[11] To calculate the number of households in the unincorporated areas of the County, Cecilton takes the total number of households in Cecil County (24,725) and from that number subtracts the number of households within the incorporated areas of Cecilton (195), Chesapeake City (290), Elkton Town (3,333), Charlestown Town (228), Northeast Town (812), Rising Sun (504), Perryville (980), and Port Deposit (241). This calculation yields a total of 18,142 households in the unincorporated areas of Cecil County. In addition, Cecilton submits a copy of its Churn Report, dated January 31, 1994, which demonstrates that Cecilton has 1,239 subscribers. Further, Cecilton acknowledges that it does not serve its entire franchise area, the unincorporated areas of Cecil County, although its franchise provides the right to do so. Cecilton, however, claims that it has not expanded service outside of its current franchise area because of the presence of three other cable operators in its franchise area, each of which has a non-exclusive, county-wide franchise to serve the unincorporated areas of Cecil County.[12] This, Cecilton argues, has imposed restrictions on Cecilton's expansion.

7. In its opposition, Cecil County claims that Cecilton has made an affirmative decision to limit its service area to a small portion of the County not served by any other operator. It also claims that Cecilton has had its franchise since 1989, but does not appear to be planning significant expansion.

8. In response, Cecilton claims that it has not affirmatively decided to limit its service area. Indeed, it states that it would choose to pass more homes in the franchise area, but that such expansion would require over-building existing systems operated by competitive franchisees in Cecil County. It argues that no bank would provide Cecilton the necessary financing for overbuilding another cable system and that such an undertaking is prohibited under Cecilton's loan agreement. Cecilton argues that because Cecil County has authorized four competing cable operators to provide service on a County-wide basis, Cecilton has been inhibited from further expansion. Cecilton states it would gladly expand its operations "should Cecil County for some reason rescind or refuse at some point to renew the franchise of one of the other operators in the County."[13]

9. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined by the Communications Act.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[15] Cecilton has failed to meet this burden.[16]

10. In the *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition.[17] Generally, "[a] franchise area is the area a system is granted authority to serve in its franchise."[18] The Commission stated, however, that a more restrictive definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator, "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's franchise area.[19] Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision. . . to restrict service."[20]

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[8] The Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543 l(1)(A), 47 C.F.R. § 76.905(b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order of Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Maryland, table 5 at 73.

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[11] As noted above, Cecilton is authorized to serve the unincorporated areas of Cecil County. Therefore, the number of households within the incorporated areas must be excluded from this total.

[12] Cecil County has issued non-exclusive franchises to four cable operators (Cecilton CATV, Inc., Tele-Communications, Inc., Tele-Media Company of Maryland, and Armstrong Communications, Inc.) Each operator is authorized to serve all of the unincorporated areas of Cecil County. *See* Cecilton Petition for Reconsideration at ¶ 8.

[13] *See* Cecilton Reply to Opposition to Petition for Reconsideration at note 4.

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911(b)(1).

[16] We draw no conclusion as to whether Cecilton has provided the Commission with sufficient evidence alleging effective competition based on the competing provider test. Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2). We recognize that there are four multichannel video programming distributors within Cecil County. However, to date, the Bureau has not been asked to determine that competition exists within the franchise area due to their presence. Should any of the operators submit new pleadings alleging effective competition under this second test, it will be considered at that time.

[17] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-(266, 9 FCC Rcd 1164 (*"First Reconsideration Order"*).

[18] *Id.* at 1180.

[19] *Id.* at 1181.

[20] *Id.*

11. The record in this case demonstrates that Cecilton has made an affirmative decision to limit its franchise area. Specifically, Cecilton acknowledges that, as part of its loan agreement, it agreed not to overbuild other cable systems which are within its franchise area. By this action, Cecilton has made an affirmative decision not to expand into areas of the franchise area which are being served by other cable operators. As Cecilton has chosen to restrict its service area in this manner, we do not believe that it is appropriate for Cecilton to base its effective competition claim on the authorized area of service--the entire unincorporated areas of Cecil County.[21] As Cecilton has not alleged facts which would allow us to determine whether it faces effective competition based on its redefined area, we will deny its petition. Should Cecilton choose to submit the appropriate information to support its effective competition claim, it may do so by filing a petition for revocation pursuant to Section 76.914 of the Commission's rules.[22]

## III. ORDERING CLAUSES

12. Accordingly, IT IS SO ORDERED that the petition for reconsideration filed by Cecilton CATV, Inc. challenging the certification of Cecil County, Maryland to regulate Cecilton CATV, Inc.'s rates IS DENIED.

13. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

14. IT IS FURTHER ORDERED that Cecilton CATV, Inc. SHALL FILE the required rate justifications on the appropriate rate forms with Cecil County within 30 days of the release date of this *Memorandum Opinion and Order* or within 30 days of receipt of notice from Cecil County that it is regulating Cecilton CATV Inc.'s basic cable service rates, whichever is later.

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[21] Cecilton argues that unlike the example the Commission gives in the *First Recon. Order*, it has not limited its service area "to a specific community." This argument lacks merit. Nowhere in its discussion of the redefined franchise area exception did the Commission state that a redefinition could occur where a cable operator made an affirmative decision to serve a specific community.

[22] 47 C.F.R. § 76.914.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

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|---|---|
| CENTURY CABLE | East Haddam, CT |
| MANAGEMENT CORPORATION | Haddam, CT |
| | Lyme, CT |
| Petition for Review of Local | Old Lyme, CT |
| Rate Order of the State | Salem, CT |
| of Connecticut | |
| Department of Public | |
| Utility Control | |

**ORDER**

**Adopted: February 10, 1995; Released: February 13, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On September 16, 1994, Century Cable Management Corporation ("Century") filed with the Commission a Petition for Review of Rate Order ("Petition") of the Connecticut Department of Public Utility Control ("the State"). Century also filed an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order on August 26, 1994. This petition for a stay of the local rate order was granted on October 6, 1994, pending resolution of the appeal.[1] The local rate order establishes a new rate schedule for Century's basic service tier and directs Century to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.[2] As part of its decision setting Century's basic tier rates, the State found Century's collective or package offering of four channels (TNT, CNN, WTBS and Discovery), known as the Century Select package, to be a regulated tier of service.[3]

2. The sole issue raised by Century in its Petition centers on the proper regulatory treatment of Century's a la carte package offering. Century argues that the State's decision to treat its a la carte package as a regulated tier of service is contrary to the objectives of the 1992 Cable Act and the Commission's a la carte rules and, therefore, the State's adverse ruling on Century's a la carte offering should be overturned. In response, the State asserts that it properly applied the Commission's guidelines on a la carte packages in treating Paragon's package as a regulated tier.[4]

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it is determined that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[9]

## II. DISCUSSION

4. Century objects to the State's finding in the local order that the channels comprising the Century Select a la carte package must be treated as regulated channels. Century argues that its a la carte package complies with the Commission's a la carte rules in effect at the time the package was created[10] and that the City's reliance upon the 15 interpretive guidelines announced by the Commission

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[1] *See Century Cable Management Corporation*, 9 FCC Rcd 5813 (1994).

[2] Petition, Exhibit A at 16 (Decision of Department of Public Utility Control in Docket No. 93-12-03). Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[3] *See* Petition, Exhibit A at 11.

[4] *See generally* Opposition of Connecticut State of Public Utility Control to the Petition for Review of Rate Decision of Century Cable Management (dated September 30, 1994). The Connecticut Office of Consumer Counsel filed an Opposition to Century's Petition endorsing the opposition of the State on October 3, 1994. Century filed a Reply to the oppositions October 13, 1994.

[5] *See* 47 C.F.R. § 76.944 (1994).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[9] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

[10] *Id.* at 9-10. *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 1164, 1184-85 (1993).

in March 1994 to determine the regulatory status of Century's a la carte channels constituted "retroactive rulemaking."[11]

5. The a la carte package at issue was first offered to Century's subscribers on September 1, 1993, when Century restructured the service offerings on its system serving the towns of East Haddam, Haddam, Lyme, Old Lyme, and Salem, Connecticut. Century states that its restructuring involved eliminating its 7 channel "Silver" tier and its 8 channel "Gold" tier and offering four channels, TNT, CNN, WTBS and the Discovery Channel, on an individual basis and also as a package that Century alleges is not subject to rate regulation. Century moved the remaining channels from the two cable programming services tiers to its80 basic service tier.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Century Cable TV*, Muncie, Indiana, LOI-93-18, DA 94-1354 (Cab. Serv. Bur., released Dec. 2, 1994) (*"Century of Muncie"*), in which we resolved the regulatory status of an la carte package offered by Century on its Muncie, Indiana, system that is essentially the same as the a la carte package at issue in this appeal. Specifically, the a la carte package at issue in *Century of Muncie* was a four channel package, made up of channels formerly available on two cable programming service tiers, which was offered as part of a restructuring. In that case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[12]

7. We find that the State's determination that Century's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Century of Muncie*. We further find that, in accordance with *Century of Muncie*, Century's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the State so that it can enter an order consistent with our findings in *Century of Muncie*.[13]

## III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the Petition for Review of the local rate order, with respect to the issue of the regulatory status of Century's a la carte package, is REMANDED to the State for resolution in accordance with the terms of this Order.

9. IT IS FURTHER ORDERED that our stay of the local order which was granted pending the resolution of this appeal is hereby VACATED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] Petition at 5-8. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an a la carte package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order* at 4214.

[12] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[13] We need not address Century's argument with respect to the "retroactive" application by the State of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Century's appeal on the a la carte issue and remand this case to the State.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 94-139**

In the Matter of

Bell Atlantic
F.C.C. Tariff No. 1,
Transmittal No. 704

## MEMORANDUM OPINION AND ORDER SUSPENDING RATES

**Adopted: February 9, 1995; Released: February 9, 1995**

By the Acting Chief, Tariff Division, Common Carrier Bureau:

## I. INTRODUCTION

1. On October 13, 1994, Bell Atlantic filed its Transmittal No. 704 to revise price cap indices and rates to recover amounts associated with its implementation of Statement of Financial Accounting Standard 112, "Standards for Employers' Accounting for Postemployment Benefits" (SFAS-112). Bell Atlantic proposes to recover these amounts over the remaining months of the 1994-95 tariff period. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Bell Atlantic's transmittal on October 29, 1994. On November 7, 1994, Bell Atlantic filed its reply to MCI's petition.

2. SFAS-112 requires that accounting for expenses for severance pay and other benefits for laid-off (or otherwise separated) workers be made on an accrual, rather than a cash or "pay as you go," basis. SFAS-112 is the forecasted liability applicable to the current work force. Beginning in 1993, SFAS-112 requires companies to take a one-time operating expense adjustment for expected future payments associated with anticipated corporate layoffs ("restructuring" or "downsizing" plans). These payments include salary continuation, supplemental unemployment benefits, severance benefits, disability related benefits (including workers' compensation), job training and counseling, and continuation of benefits such as health care and life insurance coverage.

3. Since 1985, the Commission has followed a policy of conforming regulatory accounting for carriers to generally accepted accounting practices (GAAP), including new standards ordered by the Financial Accounting Standards Board (FASB), unless adoption of the principle or practice conflicts with the Commission's regulatory objectives. *See* Section 32.16 of the Commission's rules, 47 C.F.R. § 32.16. The Commission has required carriers to adopt SFAS-112 for Part 32 accounting.[1] In its review of our *OPEB Order*,[2] the Unites States Court of Appeals for District of Columbia Circuit held that under our rules, GAAP changes, once mandated by the Commission, are treated the same as changes made by the Commission to the Uniform System of Accounts (USOA), which are entitled to automatic exogenous treatment.[3] We conclude, consistent with the court's holding in *Southwestern Bell Telephone Company v. F.C.C.*, the SFAS-112 costs may also be eligible for exogenous treatment.

## II. POSITIONS OF THE PARTIES

4. Bell Atlantic states that in SFAS-112, the FASB modified GAAP to require the recognition of the cost of postemployment benefits on an accrual basis.[4] Bell Atlantic proposes a one-time charge representing the "catch-up" costs for workers compensation, long term disability, and the cost of disability pension benefits.[5]

5. Bell Atlantic states that it did not include separations pay plan benefit costs in the initial adoption of SFAS-112. Because of its history of using other incentives to achieve force reduction objections, Bell Atlantic argues, the cost of separation pay plan benefits could not be estimated at the time of adoption of SFAS-112. Bell Atlantic continues that, since the incremental costs resulting from SFAS-112 were not included in its base period costs or price cap indices in the 1994 annual price cap tariff filing, Bell Atlantic proposes to treat these additional costs, less "pay-as-you-go" amounts, as exogenous. In this filing, Bell Atlantic is requesting exogenous treatment for both the SFAS-112 Transition Benefit Obligation (TBO), as well as ongoing SFAS-112 costs.[6]

6. Bell Atlantic's analysis concludes that the adoption of SFAS-112 has little or no impact on the GNP-PI; however, the analysis does suggest that ongoing SFAS-112 costs may have a *de minimis* impact on GNP-PI. Therefore, Bell Atlantic states that it includes an adjustment to its SFAS-112 costs to reflect a nominal GNP-PI impact.[7]

7. Bell Atlantic claims $50.7 million of SFAS-112 costs as exogenous. Bell Atlantic proposes to increase rates by approximately 1.96 percent. At the basket level, common line would increase 1.82 percent or $23.0 million; switched traffic sensitive rates would increase 2.04 percent or $9.7 million; trunking rates would increase approximately 2.05 percent or $16.9 million; and interexchange rates would increase 2.52 percent or $1.06 million.[8]

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[1] *RAO Letter 22*, 8 FCC Rcd 4111 (Acc. & Aud. Div., Com. Car. Bur. 1993).

[2] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Post retirement Benefits Other Than Pensions," CC Docket No. 92-101, 8 FCC Rcd 1024 (1993)( *OPEB Order*).

[3] *Southwestern Bell Telephone Company v. FCC*, 28 F.3d 165, 169-70 (D.C. Cir. 1994).

[4] Bell Atlantic Transmittal No. 704, Description & Justification (D&J), filed october 13, 1994 at 1-2, *citing*, SFAS No. 112 Employers' Accounting for Postemployment Benefits, Financial Accounting Standards Board (November 1992) at para. 1.

[5] *Id.* at 1-5.

[6] The TBO is the one-time catch-up of postemployment benefit costs up to the time of SFAS-112 adoption.

[7] Bell Atlantic D&J at 1-6 - 1-7.

[8] Bell Atlantic D&J at Section 5.

8. MCI argues that Bell Atlantic has failed to provide sufficient cost support information as required by Section 61.49(a) of the Commission's rules. *See* 47 C.F.R. § 61.49(a). Specifically, MCI asserts that Bell Atlantic has neglected to make projections about the disability, workers compensation, severance and other requirements of its employees. Further, MCI claims that Bell Atlantic has made no estimate of a discount rate, period of time or other financial factors in determining its present value of its SFAS-112 claim.[9]

9. For example, MCI continues, Bell Atlantic determined its allocation of SFAS-112 costs between nonregulated and regulated activities by using the ratio of Corporation Operations expenses to Total Company Corporation Operations expenses; however, this allocation may not be consistent with the long-term disability, workers compensation or severance costs of employees under the subject-to-separations group.[10] MCI argues that Bell Atlantic has reduced its workforce by 6,400 employees during the last several years.[11] MCI argues that it is possible that a higher percent of employee reductions were in the part of Bell Atlantic that is subject to separations. Further, MCI contends, it is possible that the areas of Bell Atlantic that are not subject to separations have lower cost structures because they are less regulated, or unregulated. MCI also asserts that it is not clear that Bell Atlantic has included severance costs in its filing.[12] MCI also questions the underlying assumptions of Bell Atlantic's double counting study.[13]

10. In reply, Bell Atlantic argues that the SFAS-112 costs were already reflected in its external and regulatory financial books prior to the request for exogenous treatment.[14] Bell Atlantic further asserts that it did not include separations pay plan benefit costs in its initial adoption of SFAS-112. Because the request for exogenous treatment covers the SFAS-112 costs as of the time of adoption of SFAS-112, Bell Atlantic continues, severance costs are not part of its request.

11. Bell Atlantic argues that, because the relevant exogenous costs are the net incremental costs associated with the adoption of SFAS-112, these costs are fixed at the time of adoption and are not affected by subsequent changes in employment levels. Furthermore, Bell Atlantic asserts, because the general ratio of regulated to nonregulated costs is based on a time period contemporaneous to SFAS-112 adoption, any impacts from past employee reductions would already be captured.

## III. DISCUSSION

12. The calculations underlying Bell Atlantic's estimate of the SFAS-112 exogenous adjustment are complex and based on numerous assumptions. Although we have reviewed Transmittal 704, its supporting documents and the pleadings, we find that several issues remain unresolved. In general, we find the supporting information provided in Transmittal 704 insufficient to answer basic questions. For example, based on the materials provided, we are unable to verify total company SFAS-112 amounts or the methods used to allocate portions of this total amount between regulated and nonregulated operations or state and interstate functions. We further find the information insufficient with respect to employee terminations and separation benefits expenses, *inter alia*. Accordingly, we conclude that an investigation of Bell Atlantic's Transmittal 704 is warranted.

13. On November 28, 1994, we suspended AT&T Communications (AT&T) Tariff F.C.C. No. 1, Transmittal No. 7322, in which AT&T sought a PCI adjustment and rate increases based on exogenous changes due to the implementation of SFAS-112.[15] We find that the issues in the instant transmittal are sufficiently similar to warrant its inclusion in the AT&T investigation.

14. Therefore, pursuant to Section 204(a) of the Communications Act[16] and Section 0.291 of the Commission's rules,[17] we hereby add to our investigation in CC Docket No. 94-139 Bell Atlantic's proposed tariff changes based on the PCI adjustments flowing from its implementation of SFAS-112. We suspend the effective date of the transmittal for one day, impose an accounting order, and initiate an investigation. Issues will be designated and a pleading cycle established in a subsequent order.

## IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revised rates set forth in Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 704 ARE SUSPENDED for one day from the current effective date and an investigation of those rates is instituted. Bell Atlantic SHALL FILE a supplement reflecting this suspension no later than 5 days from the release of this Order.

16. IT IS FURTHER ORDERED that, pursuant to Section 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Bell Atlantic SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are the subject of this investigation.

17. IT IS FURTHER ORDERED that Bell Atlantic SHALL INCLUDE A STATEMENT in all subsequent transmittals revising rates indicating whether, and to what extent, the price change is predicated upon the exogenous cost claim set forth in Transmittal No. 704.[18]

18. IT IS FURTHER ORDERED that the petition to suspend and investigate Bell Atlantic Transmittal No. 704, filed by MCI Telecommunications Corporation, IS GRANTED to the extent discussed above.

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[9] MCI Petition at 5.
[10] *Id.* at 6.
[11] *Id., citing* "Technology: Bell atlantic Discloses Plans to Take Charge, reduce 5,600 Jobs," Wall Street Journal, August 16, 1994.
[12] MCI Petition at 6-7.
[13] *Id.* at 8.
[14] Bell Atlantic Reply at 2.
[15] AT&T Communications, F.C.C. Tariff No. 1, Transmittal No. 7322, CC Docket No. 94-139, 9 FCC Rcd 7229 (Com. Car. Bur. 1994).
[16] 47 U.S.C. § 204(a).
[17] 47 C.F.R. § 0.291.
[18] We anticipate that any such transmittals will be suspended for one day, included in this investigation, and made subject to an accounting order.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CI Docket No. 95-6**

In the Matter of

The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: January 13, 1995; Released: February 10, 1995**

By the Commission:

## I. INTRODUCTION

1. In *United States Telephone Association v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994), the United States Court of Appeals for the District of Columbia Circuit set aside the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*Forfeiture Policy Statement*). The Court found that the *Forfeiture Policy Statement* as implemented by the Commission had the status of a rule and thus was improperly issued without notice and comment. *See* 5 U.S.C. § 553(b). This *Notice of Proposed Rulemaking* (NPRM) seeks comments on the *Forfeiture Policy Statement* and proposes to amend Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, by adding a note that incorporates the guidelines for assessing FCC forfeitures.

## II. DISCUSSION

2. The proposed forfeiture guidelines are identical to the 1993 version appended to the *Forfeiture Policy Statement* and are attached as Appendix A. If adopted, we would be guided by these guidelines, but remain free to exercise discretion in specific cases. *See Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Insurance Co.*, 589 F. 2d 658 (D.C. Cir. 1978).

3. The benefits of our adopting such a schedule would include comparable treatment of similarly situated offenders and clearer guidance to the public regarding the forfeitures that can be expected in response to specific violations. Adopting such standards also would increase our administrative efficiency in determining the appropriate range of forfeitures for various offenses, is consistent with a recommendation of the Administrative Conference of the United States (ACUS), and is similar to approaches adopted by certain other regulatory agencies.[1] However, it is possible that, notwithstanding the adjustment factors provided for in the guidelines and the flexibility the Commission retains in determining the amount of a fine in any particular case, different categories of licensees may be impacted disproportionately under a guidance-based system.

4. We request comment on all aspects of the proposal, including on the advantages and disadvantages of adopting forfeiture guidelines instead of proceeding on our traditional case-by-case basis. We ask commenters to address whether licensees are benefitted or disadvantaged by the guideline system, and more generally, whether the benefits of the guideline system outweigh any perceived detriments. With respect to the guidelines themselves, we ask whether the base forfeiture amounts set forth in the guidelines are set at appropriate levels, or whether some may be set either too high or too low based on the nature of the violation. We request comment on the use of different base forfeiture amounts for similar violations in different services in light of the different maximum forfeiture amounts for the different services set forth in the statute. *See* 47 U.S.C. §§ 503(b)(2)(A)-(C). Commenters who disagree with this approach should propose alternative approaches and explain how their proposals would reflect the distinctions among services in the statute for purposes of maximum forfeiture amounts. For example, if the base forfeiture amounts for all services were set at the same level, should the Commission adopt different ranges for the adjustment factors to reflect the different statutory maxima? As an alternative, should the Commission eliminate the ranges for the adjustment factors? We, thus, ask for comments on the proposed base amounts, adjustment factors, and adjustment factor ranges.

5. In concluding that we may not implement the *Forfeiture Policy Statement* and guidelines without notice and comment, the Court did not question our authority to adopt the *Forfeiture Policy Statement* to provide general guidance that does not bind the Commission or its staff. Thus, we propose to incorporate the guidelines as a note to our forfeiture rule (47 C.F.R. § 1.80) and to clarify that the guidelines set forth general guidance that the Commission and the staff may choose to apply in appropriate cases. We continue to believe that, ultimately, every decision must be based on the specific facts and equities at issue, taking into account the factors set forth in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D). Thus, under the *Policy Statement* the Commission would retain discretion to depart from the guidelines in appropriate circumstances. In this regard, we stress that the adjustment factors set forth in the guidelines, which track Section 503(b)(2)(D) closely, are not intended to be exclusive adjustment factors. Similarly, it is not our intent that the guidelines be read to require that a forfeiture be issued in any particular case. The Commission would retain discretion not to issue a forfeiture in particular circumstances. We ask for comment on this proposal and whether, in the alternative, we should adopt the guidelines as a binding rule.

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[1] *See* ACUS, *Agency Assessment and Mitigation of Civil Money Penalties, Recommendation No. 79-3. See also* 10 C.F.R. Chapt. I, Part 2, App. C (General Statement of Policy and Procedure for NRC Enforcement Actions)(1994).

6. If retained, we propose to apply the *Forfeiture Policy Statement* and guidelines to all forfeiture proceedings begun after the effective date of the *Forfeiture Policy Statement* and guidelines. For forfeiture proceedings begun but not completed before the effective date, we propose to reach decisions on a case-by-case basis as we have been doing since issuance of the *USTA* decision. We ask for comment on this approach and whether, if the *Forfeiture Policy Statement* and guidelines are adopted, they should be applied to all cases pending as of the time of their effective date.

7. Our goal in this proceeding is to carefully examine all issues related to the imposition of forfeitures based on a system of guidelines. We ask interested parties for their views and suggestions on any matters germane to resolving these issues.

## III. CONCLUSION

8. This *Notice of Proposed Rulemaking* is issued under the authority contained in Sections 4(i), 303(r), and 503(b) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 503(b). Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before [ insert date 30 days from publication in the FR], and reply comments [15 days from date given for comment period]. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

9. *Ex Parte Rules - Non-Restricted Proceeding:* This is a non-restricted notice and comment rule making proceeding. Members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

## IV. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

10. *Reason for Action:* This proposed rulemaking is designed to solicit comments regarding the Commission's proposed re-adoption of the *Forfeiture Policy Statement*, 8 FCC Rcd 6215 (1993), which was vacated by the United States Court of Appeals for the District of Columbia Circuit in *United States Telephone Ass'n v. FCC*, 28 F. 3d 1232 (D.C. Cir. 1994).

11. *Objectives:* The Commission is seeking information regarding the guidelines to be used in implementing its authority to issue increased monetary forfeiture penalties.

12. *Legal Basis:* The proposed action is authorized under the authority contained in Sections 4(i), 303(r), and 503(b) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 503(b).

13. *Reporting, Recordkeeping and Other Compliance Requirements:* None.

14. *Federal Rules Which Overlap, Duplicate or Conflict With These Rules:* None.

15. *Description, Potential Impact, and Number of Small Entities Involved:* Adoption of this Policy Statement could affect all licensees, including those that qualify as small business entities, who receive a monetary forfeiture as a result of a violation of the Communications Act or of the Commission's Rules. Non-licensees may also be liable for a monetary forfeiture if violations are repeated and they have previously received a warning or citation.

16. *Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:* The Notice solicits comments on better ways to accomplish the goals of developing guidelines for determining forfeiture amounts and providing notice to the public about the range of forfeiture amounts that may be assessed in particular cases. We are unable to assess at this time what, if any, economic impact the proposed rule change would have on small business entities. A full assessment of the potential economic impact, as required by Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 5 U.S.C. § 605(b)) will be made, if applicable, at the final rulemaking stage.

## V. ORDERING CLAUSE

17. IT IS ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No., 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1994) .

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### Part 1--PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

**AUTHORITY: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 21 U.S.C. 853a, unless otherwise noted.**

2. Section 1.80 is amended by adding a note to read as follows:

**§1.80 Forfeiture proceedings.**

* * * * *

(b) * * *

(4) * * *

## Note: GUIDELINES FOR ASSESSING FCC FORFEITURES[2]

### I. BASE AMOUNTS FOR SECTION 503 FORFEITURES

| VIOLATION | % of Stat. Max. | BC/CABLE $25,000 | CC $100,000 | OTHER $10,000 |
|---|---|---|---|---|
| Misrepresentation/lack of candor | 80% | 20,000 | 80,000 | 8,000 |
| Construction and/or operation without an instrument of authorization for the service | 80% | 20,000 | 80,000 | 8,000 |
| Unauthorized substantial transfer of control | 80% | 20,000 | 80,000 | 8,000 |

[2] The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceilings per violation or per day for a continuing violation stated in Section 503 of the Communications Act and the Commission's Rules are $100,000 for common carriers or applicants, $25,000 for broadcasters and cable operators or applicants, and $10,000 for all others. These base amounts listed are for a single violation or single day of a continuing violation. 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80. For continuing violations involving a single act or failure to act, the statute limits the forfeiture to $1,000,000 for common carriers or applicants, $250,000 for broadcasters and cable operators or applicants, and $75,000 for all others. Id. There is an upward adjustment factor for repeated or continuous violations, see Section II, infra. That upward adjustment is not necessarily applied on a per violation or per day basis. Id. Unless Commission authorization is required for the behavior involved, a Section 503 forfeiture proceeding against a non-licensee or non-applicant who is not a cable operator or is not operating in the radio control or citizens band radio service can only be initiated for a second violation, after issuance of a citation in connection with a first violation. 47 U.S.C. § 503(b)(5). A citation is not required, however, for non-licensee tower owners who have previously received notice of the obligations imposed by Section 303(q) from the Commission or the permittee or licensee who uses that tower. Id. Forfeitures issued under other sections of the Act are dealt with separately in Section III below.

| VIOLATION | % of Stat. Max. | BC/CABLE $25,000 | CC $100,000 | OTHER $10,000 |
|---|---|---|---|---|
| Violations of rules relating to distress & safety frequencies | 80% | 20,000 | 80,000 | 8,000 |
| False distress communications | 80% | 20,000 | 80,000 | 8,000 |
| Alien ownership violation | 80% | 20,000 | 80,000 | 8,000 |
| Failure to permit inspection | 75% | 18,750 | 75,000 | 7,500 |
| Violation of operator service requirements | 75% | n.a. | 75,000 | 7,500 |
| Violation of pay-per-call requirements | 75% | n.a. | 75,000 | 7,500 |
| Unauthorized conversion of long distance telephone service | 75% | n.a. | 75,000 | n.a. |
| Malicious interference | 70% | 17,500 | 70,000 | 7,000 |
| Importation or marketing of unauthorized equipment | 70% | n.a. | 70,000 | 7,000 |
| Exceeding authorized antenna height | 60% | 15,000 | 60,000 | 6,000 |
| Transmission of indecent/ obscene material | 50% | 12,500 | n.a. | 5,000 |
| Violation of political rules: reasonable access, lowest unit charge, equal opportunities and discrimination | 50% | 12,500 | n.a. | n.a. |
| Fraud by wire, radio or television | 50% | 12,500 | 50,000 | 5,000 |
| Exceeding power limits | 40% | 10,000 | 40,000 | 4,000 |
| No licensed operator on duty | 40% | 10,000 | n.a. | 4,000 |

| VIOLATION | % of Stat. Max. | BC/CABLE $25,000 | CC $100,000 | OTHER $10,000 |
|---|---|---|---|---|
| Failure to maintain directional pattern within prescribed parameters | 40% | 10,000 | n.a. | n.a. |
| Failure to respond to Commission communications | 40% | 10,000 | 40,000 | 4,000 |
| Unauthorized emissions | 40% | 10,000 | 40,000 | 4,000 |
| Using unauthorized frequency | 40% | 10,000 | 40,000 | 4,000 |
| EBS equipment not installed or operational | 40% | 10,000 | n.a. | n.a. |
| Violation of children's television commercialization or programming requirements | 40% | 10,000 | n.a. | n.a. |
| Violation of main studio rule | 40% | 10,000 | n.a. | n.a. |
| Violation of broadcast hoax rule | 40% | 10,000 | n.a. | n.a. |
| Failure to engage in required frequency coordination | 40% | 10,000 | 40,000 | 4,000 |
| AM tower fencing | 40% | 10,000 | n.a. | n.a. |
| Failure to comply with prescribed lighting & marking | varies | 8,000 | 8,000 | 8,000 |
| Violation of public file rules | 20% | 5,000 | 20,000 | n.a. |
| Unauthorized discontinuance of service | 20% | 5,000 | 20,000 | 2,000 |
| Use of unauthorized equipment | 20% | 5,000 | 20,000 | 2,000 |
| Construction or operation at unauthorized location | 20% | 5,000 | 20,000 | 2,000 |

| VIOLATION | % of Stat. Max | BC/CABLE $25,000 | CC $100,000 | OTHER $10,000 |
|---|---|---|---|---|
| Violation of transmitter control and metering requirements | 20% | 5,000 | 20,000 | 2,000 |
| Failure to file required forms or information | 20% | 5,000 | 20,000 | 2,000 |
| Violation of sponsorship ID requirements | 20% | 5,000 | n.a. | n.a |
| Violation of requirements pertaining to broadcasting of lotteries or contests | 20% | 5,000 | n.a. | n.a |
| Broadcasting telephone conversations without authorization | 20% | 5,000 | n.a. | n.a. |
| Failure to make required measurements or conduct required monitoring | 10% | 2,500 | 10,000 | 1,000 |
| Violation of enhanced underwriting requirements | 10% | 2,500 | n.a. | n.a. |
| Failure to provide station ID | 5% | 1,250 | 5,000 | 500 |
| Unauthorized pro forma transfer of control | 5% | 1,250 | 5,000 | 500 |
| Failure to maintain required records | 5% | 1,250 | 5,000 | 500 |
| Miscellaneous minor violations | 2.5% | 625 | 2,500 | 250 |

## II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES[3]

### Upward Adjustment Criteria

| | |
|---|---|
| (1) Egregious misconduct | 50-90% |
| (2) Ability to pay/relative disincentive[4] | 50-90% |
| (3) Intentional violation | 50-90% |
| (4) Substantial harm | 40-70% |
| (5) Prior violations of same or other requirements | 40-70% |
| (6) Substantial economic gain | 20-50% |
| (7) Repeated or continuous violation | varies[5] |

### Downward Adjustment Criteria

| | |
|---|---|
| (1) Minor violation[6] | 50-90% |
| (2) Good faith or voluntary disclosure | 30-90% |
| (3) History of overall compliance | 20-50% |
| (4) Inability to pay | varies[7] |

[3] Both upward and downward adjustments are applied to the base forfeiture amount. More than one factor may apply in a given case. This list of factors is intended to include the most common situations that arise under section 503(b)(2)(D) and is not intended to limit the Commission's discretion under that section.

[4] The Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D).

[5] The percentage adjustment for this criterion could vary up to the statutory maximum per violation or per day of a continuing violation.

[6] A "minor" violation is misconduct which is at a low level of seriousness within the violation category. A minor violation is the opposite of "egregious misconduct."

[7] As noted above, the Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 U.S.C. § 503(b)(2)(D). The application of a downward adjustment for inability to pay is based

## III. NON-SECTION 503 FORFEITURES

| Violation | | Statutory Amount[8] |
|---|---|---|
| Sec. 202(c) | Common carrier discrimination | $6,000 $300/day |
| Sec. 203(e) | Common carrier tariffs | $6,000 $300/day |
| Sec. 205(b) | Common carrier prescriptions | $12,000 |
| Sec. 214(d) | Common carrier line extensions | $1,200/day |
| Sec. 219(b) | Common carrier reports | $1,200 |
| Sec. 220(d) | Common carrier records & accounts | $6,000/day |
| Sec. 223 | Dial-a-Porn | $50,000 maximum/day |
| Sec. 364/386 | Ship radio | $5,000/day (owner)<br>$1,000 (master) |
| Sec. 506 | Great Lakes Agreement | $500/day (owner)<br>$100 (master) |
| Sec. 634 | Cable EEO | $500/day |

Note: Non-section 503 forfeitures may be adjusted downward using the "Downward Adjustment Criteria" shown for section 503 forfeitures in Section II above.

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upon a showing of substantial financial hardship. Inability to pay would generally be considered as a downward adjustment factor only upon a specific showing by the entity against whom forfeiture action is taken. However, in cases involving violations by individuals who are not in the business of providing radio services, e.g., recreational licensees, financial hardship may be presumed to exist in appropriate cases prior to a specific showing.

[8] Unlike section 503, which establishes maximum forfeiture amounts, other sections of the Act, with one exception, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. The one exception is section 223 of the Act, which provides a maximum of $50,000 per day. For convenience, the Commission will treat the $50,000 set forth in section 223 as if it were a prescribed base amount, subject to downward adjustments.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

FOX TELEVISION STATIONS, INC. File No. BRCT-940201KZ

For Renewal of License for
Station WNYW-TV, New York,
New York

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 6, 1995; Released: February 6, 1995**

By the Commission:

1. This order denies challenges to two orders by the Mass Media Bureau, which established procedures for an investigation of Fox Television, Inc. (Fox), the renewal applicant in this proceeding. The Metropolitan Council of NAACP Branches, *et al.* (the NAACP) has filed an application for review that seeks the termination of the investigation and designation of the application for hearing.[1] Rainbow Broadcasting, Inc. (Rainbow) seeks to participate in the investigation.[2] Rainbow and the NAACP also challenge subsidiary aspects of the investigation.

## I. BACKGROUND

2. In this proceeding, Fox seeks renewal of its license to operate Station WNYW-TV in New York City. The NAACP filed a petition to deny Fox's renewal application. The NAACP contends that Fox is unqualified to be a Commission licensee, in part, because of issues relating to alleged lack of candor by the licensee. Specifically, the NAACP alleged that, in 1985, when Fox obtained Commission approval for acquiring WNYW-TV and five other television stations, and in subsequent applications, Fox concealed from the Commission the extent of the ownership interest held by an Australian company, the News Corporation Ltd., in the parent company of the Fox television licensee companies.

3. To assist the Commission in resolving these issues, the Mass Media Bureau decided to initiate an investigation of the circumstances surrounding the Commission's approval of Fox's acquisition of the six stations. *See Interim Procedural Order*, File No. BRCT-940201KZ (Dec. 7, 1994) (First Procedural Order); *Second Interim Procedural Order*, File No. BRCT-940201KZ (Dec. 21, 1994) (Second Procedural Order). The investigation contemplated the production of relevant documents as well as witness depositions or interviews. *Id.* The Bureau afforded the NAACP an opportunity to participate in the investigation by providing access to all documents produced and by allowing it to attend depositions, at which the NAACP may pose a limited number of questions to the witnesses and suggest other questions to the Bureau.[3]

4. The First Procedural Order envisioned that, at the conclusion of the investigation, the entire record of the investigation would be made publicly available. First Procedural Order at ¶ 1. It provided, however, that, during the investigation, communications to and from the Commission regarding the investigation and information adduced during the investigation should not be disclosed other than to the Commission and to attorneys for the parties and certain other persons. *Id.* at ¶ ¶ 4-6. The Second Procedural Order eliminated most of these restrictions on disclosure and deemed confidential only (1) the transcripts of witness interviews and depositions and (2) information, including documents, for which confidentiality was requested and granted. Second Procedural Order at ¶ 2.

5. Allegations regarding Fox's ownership and candor were also raised collaterally in another proceeding, which involved Fox's application for renewal of Station KTTV-TV in Los Angeles. *Fox Television Stations, Inc.*, 9 FCC Rcd 62 (1993), *app. pending sub nom. Rainbow Broadcasting, Inc. v. FCC*, No. 94-1060 (D.C. Cir. to be argued Feb. 27, 1995). Specifically, Rainbow, which filed an application for a construction permit mutually exclusive with Fox's renewal application, sought to reopen the record in the Los Angeles proceeding to consider the NAACP's allegations. *Id.* at 66 n.15. In that proceeding, the Commission ultimately granted Fox's renewal application and denied Rainbow's mutually exclusive application for a construction permit because Rainbow was not financially qualified. The Commission also declined to consider the alien ownership issues in the Los Angeles proceeding because they would be considered in the proceeding in which they were first raised. 9 F.C.C. Rcd at 66 n.15.[4]

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[1] See: (1) Application for Review of Interim Procedural Order, filed December 15, 1994, by the Metropolitan Council of NAACP Branches, *et al.*, Comments, filed December 30, 1994, by Fox Television Stations, Inc., and a Reply Memorandum, filed January 5, 1995, by the NAACP; (2) a Motion for Immediate Consideration of Application for Review of Interim Procedural Orders, and for Prompt Commencement of a Public Section 309 Hearing, filed December 27, 1994, by the NAACP; and (3) a Motion to Reschedule Depositions, filed December 29, 1994, by the NAACP.

[2] See Objection and Emergency Petition for Relief, filed December 12, 1994, by Rainbow Broadcasting, Inc. and an Opposition, filed December 28, 1994, by Fox.

[3] *See* Letter from Rene'e Licht, Deputy Chief, Mass Media Bureau, to William S. Reyner, Jr., Esq., Laura Blackburne, Esq., and David Honig, Esq. (Jan. 13, 1995).

[4] The NAACP first raised the foreign ownership allegations in a proceeding involving Fox's application to acquire Station WGBS-TV in Philadelphia. When Fox's Philadelphia application was voluntarily dismissed, the issues were transferred to this (New York) proceeding. On appeal in the Los Angeles proceeding, Rainbow asked the court to remand the case to the Commission to consider the foreign ownership allegations. That question is currently pending before the court.

## II. THE NAACP'S PLEADINGS

6. The NAACP's application for review and related pleadings raise three main issues. First, the NAACP argues that the Bureau erred in deciding to conduct an investigation rather than designating Fox's renewal application for hearing. Second, the NAACP challenges the confidentiality provisions of the First Procedural Order, arguing that the Bureau lacks the authority to close the investigation. Third, the NAACP seeks to delay the taking of depositions until document production is completed and privilege issues are resolved.

7. The NAACP also requests immediate consideration of its application for review, urging that the proceedings now being conducted by the Bureau will make it impossible for the Commission ever to determine the full truth in this matter. As discussed below, we disagree with these contentions. Nevertheless, in the interests of ensuring full fairness to the parties, we have undertaken to resolve promptly these interlocutory appeals of the Bureau's procedural rulings.

### A. Propriety of the Investigation

8. The NAACP's application for review asserts that the evidence before the Commission raises a substantial and material question of fact regarding Fox's candor concerning its alien ownership and that under these circumstances a hearing is required under 47 U.S.C. § 309. In the NAACP's view, the Bureau has already conducted a sufficient investigation by posing questions regarding Fox's ownership in two letters sent to Fox in March and May of 1994, and no further investigation is necessary or appropriate. The NAACP urges that it is entitled to a hearing under section 309 and is prejudiced by the limits placed on its participation in the investigation, in comparison with the panoply of procedural rights it would be entitled to in a full hearing.

9. The NAACP particularly takes issue with the Bureau's decision to conduct depositions and interviews as part of the investigation. The NAACP alleges that this will affirmatively harm the Commission's "truth seeking ability" at any future hearing. Motion for Immediate Consideration at 3 n.1. The NAACP maintains that the depositions will disclose the Bureau's and the NAACP's trial strategy to Fox. According to the NAACP, this will allow witnesses to discuss their testimony after the depositions, and to tailor and rehearse their future testimony, and will preclude spontaneous cross-examination in the future. Thus, the NAACP argues, the effectiveness of any future hearing will be compromised.

10. Fox replies that there is no need for either the current investigation or a full hearing. According to Fox, there are no material facts in dispute and the Commission could decide the validity of Fox's ownership as a matter of law. Fox contends that it made full disclosure of relevant facts at the time of its 1985 acquisitions.

11. We disagree with the NAACP's contention that the Bureau's course of action in this proceeding is defective. The use of predesignation investigations is a judicially-approved procedure. The court in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*en banc*), specifically held that if the Commission concludes from the initial pleadings that a factual uncertainty prevents summary renewal of a license, the Commission has the discretion to seek further information to resolve the factual uncertainty rather than to designate the application for hearing. 595 F.2d at 630 n.34. The method the Commission uses to resolve the factual uncertainty is up to the Commission. *Id.* at 634. Accordingly, we decline to set aside the Bureau's orders by terminating this investigation.

12. In this regard, we stress that no determination has yet been made whether to designate this application for hearing. The decision will be made in due course after the conclusion of the investigation. Thus, to the extent that the NAACP argues that it is being deprived of hearing rights under section 309, its arguments are premature.

13. As to the NAACP's claims that the investigation will taint any subsequent hearing, we find these objections overstated. The use of depositions in this investigation, for example, is not unlike their use in ordinary pre-trial discovery. By implication, taking depositions does not taint the subsequent trial. Indeed, generally speaking, trial practice favors disclosure of the issues and facts consistent with recognized privileges. *See* Fed. R. Civ. P. 26; *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Moreover, the Bureau has sought to minimize any risks by instructing that witnesses at the depositions not discuss their testimony with each other. By effectively applying the "rule on witnesses" to this investigation, the Bureau has satisfied a primary concern raised by the NAACP. Motion for Immediate Consideration at 7-9. NAACP's complaints about its limited participation in the investigation are also misplaced. As the court makes clear, although they should be afforded an opportunity to comment on the report of the investigation, petitioners to deny otherwise have no right to participate in a *Bilingual* investigation. 595 F.2d at 634 and n.55.

### B. Confidentiality Provisions

14. In its application for review, the NAACP challenges the provision of the First Procedural Order restricting the disclosure of confidential information concerning the investigation.[5] According to the NAACP, the Bureau had no basis to treat the proceeding as non-public and acted in contravention of the public's and the media's right of access to administrative proceedings. The NAACP characterizes the restriction on disclosure as an unconstitutional prior restraint on free speech. It contends that public interest benefits would flow from public scrutiny of and participation in the investigation.

15. Much of this issue has been mooted by events subsequent to the application for review. In particular, the Second Procedural Order eliminated most of the restrictions on disclosure contained in the First Procedural Order, defining as confidential only transcripts of witness depositions and interviews, and documents that have since been disclosed. Second Procedural Order at ¶ 2. Indeed, the NAACP concedes in its Motion for Immediate Consideration at n.1 that this has become a "side issue."

16. In any event, it is well established that the Commission has the discretion to conduct non-public investigations. *See FCC v. Schreiber*, 381 U.S. 279, 292 (1965). *See also SEC v. Jerry T. O Brien, Inc.*, 467 U.S. 735, 744-45 (1984). We have routinely exercised this discretion and initiated non-public investigations where this would

[5] Rainbow raises similar arguments in its pleading.

better serve the public interest. *See, e.g., Inquiry into Alleged Abuses of the Commission's Auction Processes*, 9 FCC Rcd 6906, 6907 ¶ 10 (1994); *Payola Inquiry*, 42 RR 2d 847, 848 ¶ 2 (1978). In particular, the basis cited for treating the testimony here as confidential -- the need to ensure that the witnesses will not be improperly influenced during the investigation -- provides an appropriate basis for exercising that discretion.

**C. Deposition Schedule**

17. The NAACP seeks postponement of the depositions scheduled by the Bureau until privilege claims have been resolved and all documents are produced. However, a substantial number of documents have now been produced, and depositions have commenced, with the NAACP participating under agreed procedures. We will dismiss this matter as moot.

## III. RAINBOW'S PLEADING

18. Rainbow argues that it should be granted party status or otherwise be allowed to participate in this proceeding. It points out that it alleged in the Los Angeles proceeding that Fox had committed a "pattern of misrepresentation." Rainbow suggests that its participation is necessary to ensure that Fox's conduct with respect to alien ownership is examined in the context of the alleged pattern of misrepresentations and that Rainbow's participation "may be *the only means* of ensuring that the FCC will take a 'hard look' at this issue." Objection at 7 (emphasis in original). Fox replies that Rainbow lacks standing to participate in the NYC license renewal proceeding, and in any event its motion to intervene is untimely.

19. We find that Rainbow has not demonstrated that its participation at this stage would assist the Bureau's investigation. We reject its assertion that only it can guarantee that the issues will be adequately addressed. Rainbow did not take the initiative in developing the relevant issues. Rather, in the Los Angeles proceeding, it merely referred the Commission to the allegations made by the NAACP, which is already participating in the investigation. 9 FCC Rcd at 66 n.15. Moreover, in the Los Angeles proceeding, the Commission considered and rejected Rainbow's allegations of a "pattern of misrepresentation," concerning matters relevant to Fox's Los Angeles renewal application. *Id.* at 65-67 ¶ ¶ 27-37. Thus, Rainbow has provided no justification for its belated injection into this phase of the proceeding, which the Bureau is attempting to conduct on an expedited basis. Rainbow will have the opportunity to comment informally on the publicly available record of the investigation once it is issued.

## IV. ORDERS

20. ACCORDINGLY, IT IS ORDERED, that the Motion for Immediate Consideration of Application for Review of Interim Procedural Orders, and for Prompt Commencement of a Public Section 309 Hearing, filed December 27, 1994, by the Metropolitan Council of NAACP Branches, *et al.* IS GRANTED in part[6] and IS DENIED in part.

21. IT IS FURTHER ORDERED, that the Application for Review of Interim Procedural Order, filed December 15, 1994, by the Metropolitan Council of NAACP Branches, *et al.* IS DENIED.[7]

22. IT IS FURTHER ORDERED, that the Motion to Reschedule Depositions, filed December 29, 1994, by the Metropolitan Council of NAACP Branches, *et al.*, IS DISMISSED as moot.

23. IT IS FURTHER ORDERED, that the Objection and Emergency Petition for Relief, filed December 12, 1994, by Rainbow Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] We have attempted to consider the NAACP's application for review expeditiously.

[7] Because the pleadings adequately ventilate the issues, we deny the NAACP's request for oral argument.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Regional Communications, Inc.
Licensee of SMR Station WNVA721
Application to take assignment of
Frequency 853.1875 MHz from
Dale Walsh and convert the
frequency to trunked use.

## MEMORANDUM OPINION AND ORDER

**Adopted: December 23, 1994; Released: February 9, 1995**

By the Commission:

## I. INTRODUCTION

1. Mobile Communications Service of Miami, Inc. ("Mobile") filed an Application for Review (the "Application") on September 8, 1992. In the Application, Mobile asks the Commission to set aside a grant of authority to Regional Communications, Inc. ("Regional") allowing Regional to take assignment of a single channel conventional station and then to combine that channel with other existing conventional stations to form a trunked SMR system.[1]

2. In order to decide this case, we explain our policies on enforcement of our rules requiring certain licensees to be in operation within specified periods in light of clarified "placed in operation" requirements adopted on October 24, 1991.[2] We also explain the interaction between former rule 90.615(b)(2)(ii) and former rule § 90.621(c) of the Commission's Rules.[3] For the reasons that follow, the Application is denied.

## II. BACKGROUND

3. Mobile objects to the grant of authority to Regional to acquire station WNUX405 from Dale Walsh and combine that station, with others, to form a trunked SMR system under call sign WNVA721.[4]

4. Mobile and Regional both operate on 853.1875 MHz in Florida. Their base stations are approximately 52 miles apart. Both licensees utilize this channel in trunked SMR systems.

5. Mobile makes three arguments why the grant of authority to Regional is improper. The first argument concerns Regional's predecessor, Dale Walsh. Mobile claims that Walsh failed to timely construct his station and place it in operation, and as a result his license cancelled automatically. Mobile bases this claim on the assertion that no end users were licensed by Walsh's construction/placed-in-operation deadline.[5]

6. Mobile also argues that because it operates a co-channel facility 52 miles from the Regional system, former rule § 90.615(b)(2)(ii) required that Mobile obtain its written consent prior to being permitted to trunk this channel. *See* 10, *infra*.

7. Finally, Mobile argues that Regional's technical showing was inadequate. Mobile points out that confusion existed regarding the height of the building on which Regional's repeater was mounted, thus causing Regional to rely on erroneous data when filing its application for authority to trunk the channel in question.

## III. DISCUSSION

8. Mobile's first argument is that the Walsh license cancelled automatically because no end users applied for licenses on his system until several weeks after his construction/placed-in-operation deadline. By *Report and Order* (*Order*) adopted October 24, 1991, 6 FCC Rcd. 7297 (1991), we amended our rules, §§ 90.631 and 90.633, to clarify that for conventional systems, the licensee must construct the base station and place one mobile in operation eight months from the date of licensing. *Id.* at 7299, 7316. At that time, we directed that enforcement of these provisions begin with systems having construction dates falling on or after the effective date of the *Order*, January 21, 1992.[6] Because the Walsh construction deadline was August 13, 1991, his system predates the start of our enforcement of the revised construction and placed in operation requirement.[7]

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[1] Mobile's Petition for Reconsideration relating to these issues was denied by letter from Terry Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau to John Prendergast, dated August 7, 1992.

[2] *See* Paragraphs 4-10, Report and Order adopted October 24, 1991, PR Docket No. 90-481, 6 FCC Rcd. 7297, 7298-99 (1991). We amended Rule Sections 90.631 and 90.633, 47 CFR §§ 90.631 and 90.633, to clarify that an end user has to be operating by an SMR station's construction/ placed in operation deadline.

[3] 47 C.F.R. §§ 90.615(b)(2)(ii) and 90.621(c). The former versions of these sections were adopted on June 14, 1990 by Report and Order, P.R. Docket No. 87-213, 5 FCC Rcd. 4016 (1990). These rules were revised by Report and Order, 8 FCC Rcd 7293 (1993) and a correction thereto published at 58 Fed. Reg. 61843 (1993).

[4] The Licensing Division of the Private Radio Bureau granted Regional this authority on May 19, 1992. On June 18, 1992, Mobile filed a Petition For Reconsideration of this grant. The Licensing Division denied this petition by letter dated August 7, 1992.

[5] *See* 47 C.F.R. 90.633. Conventional licensees such as Walsh are required to construct their stations and place them in operation within eight months of the license grant.

[6] In paragraph 8 of the October 24, 1991 Order, we stated:

> We will begin enforcement of both rules (as per paragraphs 9 and 10) for licensees with eight-month or one-year construction/placed-in-operation deadlines falling on or after the effective date of this proceeding.

6 FCC Rcd. at 7299 (footnotes omitted).

[7] With Walsh's license issued on December 13, 1990, his construction/placed-in-operation deadline was August 13, 1991.

9. We provided this prospective enforcement schedule due to the significant confusion which, at that time, surrounded the "placed in operation" requirement. Having announced this schedule, we find that Mobile's assertions that Walsh's license cancelled automatically are not well taken. It would be unfair to enforce the clarified requirement given the misunderstanding over what constituted placing a station into operation. Having constructed his station which was capable of being operated, Walsh apparently believed that he had satisfied all necessary requirements. The Commission, in its *Order*, clarified that constructing a station and placing it in operation are two separate actions, each of which must be taken to satisfy the construction/placed in operation requirement.

10. Mobile's second argument asserts that the grant of authority for Regional to combine the General Category channel obtained from Walsh with other channels to form a trunked system was improper because former § 90.615(b)(2)(ii) required that the written consent of co-channel users within 70 miles be obtained prior to trunking a General Category channel. Mobile, however, does not discuss the qualifying language contained in former § 90.615(b)(2)(ii), which stated:

> Each application must include a written signed statement from each co-channel licensee located within 70 miles of the primary site of the trunked system verifying that each such licensee has agreed to the proposed trunked use (see § 90.621(c)). The statement should include each licensee's call sign. (emphasis added).[8]

11. The parenthetical reference in former § 90.615(b)(2)(ii) to former § 90.621(c) qualified the 70 mile requirement.[9] Seventy miles is the typical separation required to prevent overlap between the predicted 40 dBu/30 dBu contours for typical co-channel systems. The separation necessary to provide this protection varies with terrain and other factors, and the rule recognizes the possibility of variance by its reference to former § 90.621(c), which provides in pertinent part:

> Trunked systems authorized on frequencies in the ... General categories will be protected solely on the basis of predicted contours. Coordinators will attempt to provide a 40 dBu contour and to limit co-channel interference levels to 30 dBu over an applicant's requested service area. This would result in mileage separation of 70 miles for typical system parameters. Applicants should be aware that in some areas, *e.g.*, Seattle, Los Angeles, and northern California, separations greater than 70 miles may be appropriate. Separations may be less than 70 miles where the requested service areas, terrain, or other factors warrant reduction. In the event that separation is less than 70 miles, the coordinator must indicate that the protection criteria have been preserved or that the affected licensees have agreed in writing to the proposed system. (emphasis added).

The former rule alerts applicants that protection from co-channel users was based solely on predicted contours.

12. Comparing this section with former § 90.621(b), which provided for fixed mileage separation criteria of 70 miles (with enumerated exceptions) without reference to the contour protection criteria, supports this interpretation. If § 90.615(b)(2)(ii) meant that trunked systems such as Mobile's were to receive protection solely on the basis of fixed mileage separation criteria, it would contradict former § 90.621(c), which states that Mobile is entitled to protection solely on the basis of predicted contours. The Commission has amended its short spacing criteria and made the new criteria found in § 90.621(b), 47 C.F.R. § 90.621(b), applicable to all Subpart S stations operating over 800 MHz. *See also*, 58 Fed. Reg. 61843 (1993). The rules for allowing trunked use of General Category frequencies requires the written consent of all co-channel licensees within a protected zone. This zone is generally 70 miles unless a demonstration is made that the area of operation, terrain, or other factors warrant a different zone of protection. While the size of this zone has recently been changed, the policy remains unchanged.

13. The spacing between Regional and Mobile, while less than 70 miles, provides for the zone of protection described in former § 90.621(c). Regional demonstrated that 40 dBu/30 dBu protection exists here, and the frequency coordinator so certified. Mobile has not contested the grant on the basis that 40 dBu/30 dBu protection is not present.

14. Further, in a *Report and Order* adopted June 24, 1990, PR Docket No. 87-213, 5 FCC Rcd 4016, 4021 (1990), we stated our intention that the rule requiring written consent of co-channel users is to protect licensees who share the use of a particular channel. *See, Id.*, paragraph 44, and footnote 61. Mobile and Regional, because they are separated by a 40 dBu/30 dBu predicted contour, were not considered to be sharing this channel under the standards applicable at the time Regional's application was granted. Therefore, the text of the June 24th Order adopting former § 90.615(b)(2)(ii) supports the result we are adopting today.

15. Mobile also contests the grant of authority to Regional claiming that Regional's licensed antenna height was in error. Initially, Regional's application reflected a building height of 323 feet, which was based on information in the Commission's antenna tower database. Because the Commission returned other applications involving antennas on the same building to Regional's counsel stating that the height of the building was 299 feet, Regional amended its application to reflect the corrected information. After being alerted to the possibility that the building height was in error, Regional reviewed the building plans with the building manager and discovered that the building is 358

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Regional provided convincing evidence, including receipts and Walsh's certification of construction, that Walsh constructed his station by that date.

[8] The bolded parenthetical has been revised to read, "(see exceptions at § 90.621(b))". 58 Fed. Reg. 61843 (1993), in accordance with the Commission's revised shortspacing policy. *See*, Report and Order, PR Dkt. No. 93-60, 8 FCC Rcd 7293 (1993).

[9] This interpretation has the logical result that the process of combining conventional channels to form a trunked system mirrors the process of obtaining a General Category channel to expand a trunked system in accordance with 47 C.F.R. § 90.621 (c) and (g).

feet tall. Regional has applied for proper FAA clearance and to modify its license to reflect the appropriate height and reduced power limitation to maintain the same contours.[10]

16. The Licensing Division granted Regional's license modification on December 16, 1992. Mobile's arguments do not demonstrate that this inadvertent error that arose from faulty information in the Commission's database provides sufficient grounds to set aside the Regional license.

17. IT IS ORDERED THAT, for the reasons stated, the Application for Review filed by Mobile Communication Service of Miami, Inc. in the above-captioned matter IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[10] *See* Letter from Regional dated October 20, 1992.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T COMMUNICATIONS,
Complainants,

v. File No. E-89-297

MCI TELECOMMUNICATIONS CORPORATION,
Defendant.

**ORDER ON RECONSIDERATION**

**Adopted: December 28, 1994; Released: February 10, 1995**

By the Commission:

1. MCI Telecommunications Corporation (MCI), pursuant to Section 1.106 of the Commission's rules, requests reconsideration[1] of the Commission's finding[2] that MCI violated Section 203 of the Communications Act (the "Act"), as interpreted by the court in *AT&T v. FCC*.[3]

2. MCI argues that the Commission should reconsider its finding that MCI violated Section 203 because: (1) it is contrary to the Commission's decision in CC Docket No. 92-13 which reaffirmed and codified its permissive detariffing rules;[4] and (2) it is based on a court decision that was still subject to further judicial review at the time MCI filed its petition.[5] MCI contends the Commission's finding of a violation was premature and unnecessary for purposes of conducting the remand proceeding ordered by the Court in *AT&T v. FCC*.[6]

3. In its Opposition, AT&T notes that on June 4, 1993, the court summarily reversed the Commission's *Rulemaking Order* as contrary to Section 203.[7] AT&T argues that although the *AT&T v. FCC* decision may be subject to further judicial review, that circumstance alone does not relieve agencies of their obligation to obey a Court's mandate.[8]

4. We deny MCI's petition. Its arguments are baseless. First, the Commission was required to apply the Court's mandate in *AT&T v. FCC* regardless of the views expressed in the *Rulemaking Order* (which, in any event, the Commission had stayed in light of the *AT&T v. FCC* decision). Second, the fact that the *AT&T v. FCC* decision was subject to possible further Supreme Court review did not effect its enforceability in the interim.[9] In any event, the Supreme Court has denied certiorari of that decision and recently the Court affirmed the Court of Appeals' reversal of our *Rulemaking Order*.[10] Our prior decision was appropriate, and timely.

5. We note, however, that, although it is now settled that MCI is required under the Act to file tariffs, it was the Commission itself that earlier determined that MCI and other nondominant carriers need not file tariffs. Subsequent judicial rulings have overturned the Commission's determinations on this issue, and we have no choice but to reaffirm that MCI's failure to file tariffs violated the Communications Act.[11]

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 208, and 409 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 208, 409 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] MCI Petition for Reconsideration, E-89-297, filed June 1, 1993 (MCI Petition).

[2] *AT&T Communications v. MCI Telecomunications Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 3202 (1993) (*Order*).

[3] *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993).

[4] *See Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, 7 FCC Rcd 8072 (1992)( *Rulemaking Order*), *stayed*, 7 FCC Rcd 7989 (1992), *rev'd*, *AT&T v. FCC*, Order Nos. 92-1628 and 92-1666 (D.C. Cir. June 4, 1993), *aff'd sub nom. MCI Telecommunications Corp. v. AT&T*, Nos. 93-356 and 93-521 (U.S. June 17, 1994).

[5] MCI Petition at 2-3.

[6] *Id.* at 3.

[7] AT&T Opposition to MCI's Petition for Reconsideration at 2, E 89-297, filed June 11, 1993.

[8] *Id.* at 2.

[9] *See* Sup. Ct. R. 23; Fed. R. App. P. 41.

[10] *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); *MCI Telecommunications Corp. v. AT&T*, Nos. 93-356 and 93-521 (U.S. June 17, 1994).

[11] Our decision is without prejudice to the issues and arguments raised by MCI in its pending petition for declaratory ruling that nondominant carriers will not be held liable for damages for tariff filing violations that predated the court's ruling. *See* MCI Petition For Declaratory Ruling, Enf. 94-02, filed March 8, 1993.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 10, 1995**

**CORRECTION**

The following Notice supersedes Public Notice (DA 95-144), released February 2, 1995:

**COMMON CARRIER BUREAU ESTABLISHES PROCEDURES FOR TARIFF FILINGS AND PART 69 RATE STRUCTURE WAIVER REQUESTS FOR LEC VIDEO DIALTONE MARKET TRIALS**

The Common Carrier Bureau has adopted the following procedures in order to expedite the review process for tariff filings that propose to establish regulations and rates applicable to market trials for video dialtone service.

1. LECs may file proposed video dialtone market trial tariff revisions and associated Part 69 rate structure waiver requests simultaneously. A courtesy copy of any Part 69 rate structure waiver request relating to video dialtone market trials should be served on the Chief, Tariff Division.

2. Comments from interested parties on Part 69 rate structure waiver requests will be due on the same date as petitions against the tariff revisions corresponding to the waiver requests. See 47 C.F.R. § 1.773(a)(2)(iii).

3. Reply comments on Part 69 rate structure waiver requests will be due on the same date as replies to petitions against the corresponding tariff revisions. See 47 C.F.R. § 1.773(b)(1)(iii).

4. Parties may combine comments on a waiver request and a tariff petition into one single document. Replies may similarly respond both to comments on the waiver request and to petitions against the tariff revisions. Such pleadings should, however, clearly distinguish arguments raised in the waiver context from arguments relevant to the tariff revisions.

In addition, comments/petitions should clearly delineate the relief sought and whether such relief implicates the waiver request, the tariff revisions, or both.

We wish to emphasize that this procedure is only being adopted for video dialtone market trials. As a matter of processing efficiency, LECs should not file tariff revisions until they have obtained any necessary Part 69 rate structure waivers. In particular cases, however, the Bureau may exercise its discretion to process a waiver petition and review tariff revisions concurrently. The Bureau will reject tariff revisions offering interstate access services not provided for in Part 69 if no waiver has been granted.

Interested parties should file an original and four copies of all comments and reply comments with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. In addition, one copy of each pleading must be sent to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the proposed tariff revisions and waiver requests can be obtained from ITS at (202) 857-3800. Both the tariff proceeding and the waiver proceeding will be treated as non-restricted for purposes of the Commission's ex parte rules. *See* generally 47 C.F.R. §§ 1.1200-1.1216. For further information, contact Wanda M. Harris of the Tariff Division, Common Carrier Bureau, at (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 93-197**

In the Matter of

Revisions to Price Cap
Rules for AT&T Corp.

**ERRATUM**

**Released: February 10, 1995**

The Report and Order in the above-captioned proceeding (FCC 95-18), released January 12, 1995, is corrected to change the second sentence in footnote 62 from:

62. This Report and Order addresses the issues raised by ARINC in its petition and accordingly, its petition is moot.

to:

62. This Report and Order addresses the issue regarding services bands raised by ARINC in its petition and accordingly, the petition is moot as to that issue.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger
Acting Deputy Bureau Chief (Operations)
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: February 10, 1995**

## COMMON CARRIER BUREAU APPLIES "PERMIT BUT DISCLOSE" *EX PARTE* RULES TO TARIFF REVIEW PROCEEDING REGARDING AT&T CONTRACT TARIFF TRANSMITTAL NO. 2952

On July 11, 1994, The Furst Group, Inc. (The Furst Group) filed a formal complaint with the Commission against AT&T Corp. (AT&T) regarding AT&T Contract Tariff No. 374.[1] On January 11, 1995, AT&T filed Contract Tariff Transmittal No. 2952, seeking to amend Contract Tariff No. 374. On January 17, 1995, The Furst Group filed a petition to reject or, in the alternative, suspend Contract Tariff Transmittal No. 2952.

Under Section 1.1208(c)(1)(ii)(B) of the Commission's rules,[2] The Furst Group's formal complaint, pursuant to Section 208 of the Communications Act,[3] is a restricted proceeding in which *ex parte* presentations are prohibited. Under Subsection 1.1204(a)(6) of the Commission's rules,[4] however, no *ex parte* restrictions would apply to the tariff proceeding on Contract Tariff Transmittal No. 2952.

We believe that the public interest in an expeditious resolution of this tariff dispute would be best served by ensuring that communications related to the tariff proceeding continue with a minimum of disruption. Yet, because the tariff and complaint proceedings appear to involve common issues and parties, we believe that this interest must be balanced against the public interest in maintaining the formal complaint process as a private adjudicatory proceeding.

The purpose of the *ex parte* rules is to ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process.[5] The Commission, in this regard, has retained the discretion to adopt, by public notice, modified or more stringent *ex parte* procedures for particular proceedings, if the public interest so requires.[6]

In balancing the interests noted above, the Bureau finds that the public interest would be served by: (1) keeping the formal complaint proceeding, E-94-72, a restricted proceeding subject to, *inter alia*, the procedures of Section 1.1208 of the Commission's Rules;[7] and (2) making applicable to the tariff proceeding the "permit but disclose" *ex parte* rules that are used in nonrestricted proceedings.[8] Under the "permit but disclose" rules, persons outside the Commission will be permitted to make *ex parte* communications to persons within the Commission about the tariff proceeding, but must file with the Secretary copies of any written material submitted, and/or a written summary of the full substance of any oral communication made (with a copy to the person or persons with whom the communication was made). All such "disclosure filings" must reference the appropriate file number or numbers.[9]

Consistent with our decision herein, either party (and its affiliates and representatives) to the formal complaint proceeding, E-94-72, who makes an *ex parte* communication to a Commission employee regarding the tariff proceeding, AT&T Contract Tariff Transmittal No. 2952, shall: (1) file the required disclosure material with both the Tariff Division and the Enforcement Division, for inclusion in the records of both the tariff proceeding and the formal complaint proceeding; and (2) serve, in accordance with 47 C.F.R. § 1.47, a copy of the disclosure filing on the other party to the complaint proceeding. Disclosure filings in the formal complaint proceeding shall be made by filing, with the Common Carrier Bureau's Formal Complaints and Investigations Branch, an original plus three copies of the disclosure filing and a certificate of service.

Notwithstanding the provisions of Subsection 1.1206(a)(2) of the Commission's rules,[10] oral-communication summaries must include data or arguments already reflected in a party's written comments, memoranda or previous filings in the tariff proceeding or any materials that are a matter of public record in the formal complaint proceeding.

Copies of Contract Tariff Transmittal No. 2952 and any subsequently filed documents regarding this tariff proceeding, including *ex parte* materials, may be obtained from International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of any materials that are a matter of public record in the formal complaint proceeding (E-94-72) will also be available from ITS.

For further information, contact Thomas G. David, Tariff Division, Common Carrier Bureau, (202) 418-1530 or Peter J. Daronco, Enforcement Division, Common Carrier Bureau (202) 418-0960.

FEDERAL COMMUNICATIONS COMMISSION

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1 *The Furst Group, Inc. v. AT&T Corp.*, File No. E-94-72.
2 47 C.F.R. § 1.1208(c)(1)(ii)(B).
3 47 U.S.C. § 208.
4 47 C.F.R. § 1.1204(a)(6).
5 *See* 47 C.F.R. § 1.1200(a).
6 *Id.*
7 47 C.F.R. § 1.1208.
8 *See, e.g.*, 47 C.F.R. § 1.1206.
9 *See, e.g.*, Public Notice, Commission Applies "Permit But Disclose" *Ex Parte* Rules to TRAC Complaint Proceeding, DA 88-1244 (August 8, 1988).
10 47 C.F.R. § 1.1206(a)(2).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Sammons Communications, Inc. CUID No. TX0545
University Park, Texas

Benchmark Filing To Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 10, 1995; Released: February 13, 1995**

By the Chief, Cable Services Bureau:

**INTRODUCTION**

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in University Park, Texas, CUID No. TX0545. The complaint was initially filed on November 1, 1993, but it was returned by the Commission on November 29, 1993 pursuant to 47 C.F.R. § 76.954. The complainant timely refiled the complaint on December 9, 1993.[1] Sammons filed a motion to dismiss the complaint on the ground that the complainant did not subscribe to Sammons' cable service on the date of either the original complaint or the refiled complaint. Attached to the motion to dismiss is an affidavit by Sammons' general manager certifying that the complainant discontinued cable service on October 13, 1993.

**DISCUSSION**

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. However, only a "subscriber, franchising authority, or other relevant State or local government entity" may file a complaint concerning CPS prices.[3] Sammons has provided sufficient information to demonstrate that the complainant did not subscribe to Sammons' cable service at the time he filed either his original complaint or his refiled complaint. Furthermore, there is no indication that the complainant represents a franchising authority or other government entity. Therefore, we will grant Sammons' motion and dismiss the complaint.

**CONCLUSIONS**

3. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motion submitted by Sammons Communications, Inc. to dismiss the December 9, 1993 complaint against the cable programming service price charged in University Park, Texas, CUID No. TX0545, IS GRANTED.

4. IT IS FURTHER ORDERED that the December 9, 1993 complaint against the cable programming service price charged by Sammons Communications, Inc. in University Park, Texas, CUID No. TX0545, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *See* 47 C.F.R. § 76.955.
[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).
[3] *See* 47 U.S.C. § 543(c)(1)(B).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cox Cable Spokane, Inc. CUID Nos. WA0162
Spokane, Washington and WA0231

Benchmark Filings To Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 10, 1995; Released: February 14, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider complaints about the price Cox Cable Spokane, Inc. ("Cox") was charging for its cable programming service ("CPS") tier in its Spokane, Washington cable system, CUID Nos. WA0162 and WA0231.[1] Cox has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Cox's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

## PROCEDURAL MATTERS

4. The first complete and timely CPS complaint for CUID No. WA0162 was served on Cox on December 21, 1993. It was received by the Commission on December 27, 1993.[12] The first complete and timely CPS complaint for CUID No. WA0231 was served on Cox on September 29, 1993.[13] It was received by the Commission on October 12, 1993.

5. Cox filed its first Form 393 filings for its Cox Cable Spokane, Inc. system, CUID Nos. WA0162 and WA0231, on November 12, 1993. While separate Forms 393 were filed for each CUID, there is no substantive difference between them. Cox filed revised Forms 393 on June 27, 1994, which Cox states reflect additional information required as a result of the Commission's *Order* of May 23, 1994.[14]

## DISCUSSION

6. Cox asserts that its monthly CPS price of $16.23 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $16.31 as calculated in it most recent filing, dated June 22, 1994. Upon review, we have found no apparent errors that would require a recalculation of Cox's maximum permitted CPS price.

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[1] According to Cox, CUID numbers WA0162 and WA0231 together constitute a single cable system and have the same programming and rates.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cox has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*) , the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cox implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, I *mplementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[12] The complaint was dated December 21, 1993, and states that it was mailed to Cox on that date. Cox has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 21, 1993 as the service date.

[13] The complaint was dated September 29, 1993, and states that it was mailed to Cox on that date. Cox has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 29, 1993 as the service date.

[14] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

## CONCLUSIONS

7. Upon review of the record herein, we conclude that Cox has demonstrated that $16.23 per subscriber per month, plus franchise fee, was a reasonable CPS tier price for the period December 27, 1993 to May 14, 1994 in the case of CUID No. WA0162, and for the period October 12, 1993 to May 14, 1994 in the case of CUID No. WA0231.[15]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Cox Cable Spokane, Inc. of Spokane, Washington in CUID Nos. WA0162 and WA0231, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Cox Cable Spokane, Inc. of Spokane, Washington for CUID No. WA0162, for the period December 27, 1993 to May 14, 1994, and CUID No. WA0231, for the period October 12, 1993 to May 14, 1994, justifies a maximum price of $16.31 per month (plus franchise fee) for Cox Cable of Spokane, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[15] This finding is based solely on the representations of Cox listed on paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Meredith Cable Television of Ramsey/Washington ("Ramsey/Washington Suburban") Oakdale, Minnesota | CUID Nos. MN0313, MN0314, MN0315, MN0316, MN0317, MN0318, MN0319, MN0320, MN0321, MN0322, MN0323, MN0324, and MN0335 |

Benchmark Filing To Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 10, 1995; Released: February 14, 1995**

By the Chief, Cable Services Bureau:

**INTRODUCTION**

1. Here we consider complaints about the price Meredith Cable Television of Ramsey/Washington ("Meredith") was charging for its cable programming service ("CPS") tier in its Ramsey/Washington Suburban cable system headquartered in Oakdale, Minnesota, CUID Nos. MN0313, MN0314, MN0315, MN0316, MN0317, MN0318, MN0319, MN0320, MN0321, MN0322, MN0323, MN0324 and MN0335.[1] Meredith has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Meredith's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

**PROCEDURAL MATTERS**

4. According to Meredith's letter to the Commission dated March 22, 1994, a single, complete and timely CPS complaint was served on Meredith "on or about" February 23, 1994 for all of the franchise areas covered by this *Order* except MN0335. A complete and timely Form 329 was served on Meredith for CUID No. MN0335 on October 1, 1993.[12]

5. Meredith filed Forms 393 for its Ramsey/Washington Suburban cable system located in Oakdale, Minnesota, for CUID Nos. MN0313, MN0314, MN0315, MN0316, MN0317, MN0318, MN0319, MN0320, MN0321, MN0322, MN0323, and MN0324 on March 24, 1994. Meredith filed a Form 393 for CUID No. MN0335 on November 16, 1993.

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[1] According to Meredith, CUID numbers MN0313, MN0314, MN0315, MN0316, MN0317, MN0318, MN0319, MN0320, MN0321, MN0322, MN0323, MN0324, and MN0335 together constitute a single cable system and have the same programming and rates. Meredith filed a separate Form 393 for CUID MN0335, but it has the same programming and rates as the other areas covered by this *Order*.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Meredith has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*) , the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Meredith implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, I *mplementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[12] The complaint was dated October 1, 1993, and states that it was mailed to Meredith on that date. With respect to this complaint filed for CUID No. MN0335, Meredith has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider October 1, 1993 as the service date.

## DISCUSSION

6. Meredith asserts that its monthly CPS price of $13.24 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $13.29 as calculated in it most recent filing. Upon review, we have found no apparent errors that would require a recalculation of Meredith's maximum permitted CPS price.

## CONCLUSIONS

7. Upon review of the record herein, we conclude that Meredith has demonstrated that $13.24 per subscriber per month, plus franchise fee, was a reasonable CPS tier price for the period from October 1, 1993 to May 14, 1994 for CUID No. MN0335, and for the period from February 23, 1994 to May 14, 1994 for all of the other franchise areas covered by this *Order*.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section .0321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Meredith Cable Television of Ramsey/Washington, on its Suburban cable system headquartered in Oakdale, Minnesota, CUID Nos. MN0313, MN0314, MN0315, MN0316, MN0317, MN0318, MN0319, MN0320, MN0321, MN0322, MN0323, MN0324 and MN0335, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Meredith Cable Television of Ramsey/Washington for its Ramsey/Washington Suburban cable system justifies a maximum price of $13.24 per month (plus franchise fee) for Meredith Cable Television of Ramsey/Washington's cable programming service tier for the period February 23, 1994 to May 14, 1994 in CUID Nos. MN0313, MN0314, MN0315, MN0316, MN0317, MN0318, MN0319, MN0320, MN0321, MN0322, MN0323 and MN0324, and for the period October 1, 1993 to May 14, 1994 in CUID No. MN0335.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[13] This finding is based solely on the representations of Cox listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Cox Cable South Carolina, Inc. North Myrtle Beach, South Carolina | CUID Nos. SC0023, SC0025 and SC0037 |

Benchmark Filings To Support
Cable Programming Service Prices

## MEMORANDUM OPINION AND ORDER

**Adopted: February 10, 1995; Released: February 14, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider complaints about the price Cox Cable South Carolina, Inc. ("Cox") was charging for its cable programming service ("CPS") tier in its North Myrtle Beach cable system, CUID Nos. SC0023, SC0025, and SC0037.[1] Cox has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Cox's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

## PROCEDURAL MATTERS

4. The first complete and timely CPS complaints for the franchise areas covered by this *Order* were served on Cox and received by the Commission on the dates listed in Appendix A.

5. Cox filed Forms 393 for all franchise areas covered by this *Order* on November 18, 1993.

## DISCUSSION

6. Cox asserts that its monthly CPS price of $13.90 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $13.92 as calculated in it most recent filing, dated November 18, 1993. Upon review, we have found no apparent errors that would require a recalculation of Cox's maximum permitted CPS price.

## CONCLUSIONS

7. Upon review of the record herein, we conclude that Cox has demonstrated that $13.90 per subscriber per month, plus franchise fee, was a reasonable CPS tier price for the period from October 15, 1993 to May 14, 1994 for CUID Nos. SC0023 and SC0025; and for the period from November 22, 1993 to May 14, 1994 for CUID No. SC0037.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable pro-

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[1] According to Cox, CUID numbers SC0023, SC0025 and SC0037 together constitute a single cable system and have the same programming and rates.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cox has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration")*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cox implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, I *mplementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[12] This finding is based solely on the representations of Cox listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate,

gramming service price charged by Cox Cable South Carolina, Inc. of North Myrtle Beach, South Carolina in CUID Nos. SC0023, SC0025, and SC0037, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Cox Cable South Carolina, Inc. of North Myrtle Beach, South Carolina for CUID Nos. SC0023, SC0025, and SC0037, for the period from October 15, 1993 to May 14, 1994 for CUID Nos. SC0023 and SC0025; and for the period from November 22, 1993 to May 14, 1994 for CUID No. SC0037, justifies a maximum price of $13.90 per month (plus franchise fee) for Cox Cable South Carolina, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

**Attachment A**

| CUID No. | Date First Complaint Filed With FCC | Date Complaint Served |
|---|---|---|
| SC0023 | 10/15/93 | 10/12/93 |
| SC0025 | 10/15/93 | 10/13/93 |
| SC0037 | 11/22/93 | 10/12/93 |

we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Cox Cable Saginaw, Inc.<br>Saginaw, Michigan | CUID Nos. MI0145,<br>MI0146, MI0148 MI0229,<br>MI0230, MI1166 |

Benchmark Filings To Support
Cable Programming Service Prices

## MEMORANDUM OPINION AND ORDER

**Adopted: February 10, 1995; Released: February 14, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider complaints about the price Cox Cable Saginaw, Inc. ("Cox") was charging for its cable programming service ("CPS") tier in its Saginaw, Michigan cable system, CUID Nos. MI0145, MI0146, MI0148, MI0229, MI0230, and MI1166.[1] Cox has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Cox's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of- service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

## PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Cox and received by the Commission on the dates set forth in Appendix A.[12]

5. Cox filed initial FCC Forms 393 on June 1, 1994 for all franchise areas in response to the complaints addressed in this order. In the case of Cox Cable Saginaw, Inc.'s Buena Vista Charter Township franchise, CUID No. MI0229, an amended Form 393 was filed with the Commission on June 22, 1994.

## DISCUSSION

6. Cox asserts that its monthly CPS price of $11.43 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge as calculated in it most recent filing, dated May 26, 1994. Upon review, we have found no apparent errors that would require a recalculation of Cox's maximum permitted CPS price.

---

[1] According to Cox, CUID numbers MI0145, MI0146, MI0148, MI0229, MI0230, and MI1166 together constitute a single cable system and have the same programming and rates.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cox has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cox implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, I *mplementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[12] Cox has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider the mailing date indicated by the complainant as the service date.

## CONCLUSIONS

7. Upon review of the record herein, we conclude that Cox has demonstrated that $11.43 per subscriber per month, plus franchise fee, was a reasonable CPS tier price for the period from the date the first complaint was received by the Commission for each franchise area, as noted in Appendix A, to May 14, 1994.' [13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Cox Cable Saginaw, Inc. of Saginaw, Michigan in CUID Nos. MI0145, MI0146, MI0148, MI0229, MI0230, and MI1166, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Cox Cable Saginaw, Inc. of Saginaw, Michigan, for CUID Nos. MI0145, MI0146, MI0148, MI0229, MI0230, and MI1166, for the period from the date the first complaint was received by the Commission for each franchise area, as noted in Appendix A, to May 14, 1994, justifies a maximum price of $11.43 per month (plus franchise fee) for Cox Cable Saginaw, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| MI0145 | 10/08/93 | 10/02/93 |
| MI0146 | 10/12/93 | 09/29/93 |
| MI0148 | 10/12/93 | 10/06/93 |
| MI0229 | 12/06/93 | 10/05/93 |
| MI0230 | 10/18/93 | 10/14/93 |
| MI1166 | 10/18/93 | 10/12/93 |

[13] This finding is based solely on the representations of Cox listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Cablevision Industries | CUID Nos. NY0268, |
| Orange County, et al. | NY0356, NY0397, |
| New York | NY0440, NY0492, |
| | NY0502, NY0503, NY0514, |
| | NY0515, NY0600, NY0717, |
| | NY0721, NY0782, NY0788, |
| | NY0928, NY1088, NY1394 |

Benchmark Filings to Support
Cable Programming Service Prices

## MEMORANDUM OPINION AND ORDER

**Adopted: February 13, 1995; Released: February 14, 1995**

By the Deputy Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider complaints about the prices Cablevision Industries ("CVI") was charging for cable service in Orange County, New York, CUID Nos. NY0492, NY0502, NY0503, NY0514, NY0717, NY1088, Tioga County, CUID No. NY0268, Wayne County, CUID Nos. NY0347, NY0788, Madison County, CUID No. NY0356, Saratoga County, CUID Nos. NY0397, NY0928, Sullivan County, CUID Nos. NY0440, NY0721, Ulster County, CUID Nos. NY0515, NY0600, Onondaga County, CUID No. NY0782, and Niagara County, CUID No. NY1394. CVI has chosen to attempt to justify its prices through benchmark showings on FCC Form 393.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review a cable operator's prices for its cable programming service ("CPS") tier upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

## DISCUSSION

4. The complaints against CVI for the communities designated by the above-listed CUID numbers state that they are being filed to object to a rate increase for the CPS tier offered by CVI. Under the Commission's rules, a complaint regarding a rate change for the CPS tier may be filed within 45 days from the date the complainant first receives a bill reflecting the rate change.[10] However, after reviewing the records in these cases, we have determined that these complaints do not relate to changes in CVI's regulated CPS rates. Rather, the complaints object to changes in CVI's rates for basic tier service, associated equipment charges for receiving basic tier service, and a la carte packages that are not subject to rate regulation. The Commission is responsible for, and its jurisdiction is limited to, regulating rates for cable programming services.[11] Accordingly, we find that we are without jurisdiction to consider the complaints discussed herein and shall dismiss them.

5. As of September 1, 1993, CVI offered subscribers a basic service tier, a CPS tier, and an a la carte package in each of the communities addressed herein. Prior to September 1, 1993, CVI, in each community listed above, removed three channels from previously regulated tiers into an a la carte package. At the same time, CVI replaced these channels on the regulated tiers with new channels. In early 1994, CVI raised its rates for the a la carte channels by approximately $1.35 in each community. However, CVI did not change its price for the preexisting CPS tier. Therefore, there was no change in the rate charged for the CPS tier that could constitute the basis for a valid complaint.

6. To the extent that these complaints object to changes in the rate charged for the basic tier and associated equipment, we lack jurisdiction to consider those complaints. Except in limited circumstances, the Commission does not

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).
[2] 47 C.F.R. § 76.956.
[3] 47 C.F.R. § 76.956(b).
[4] *Id.*
[5] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).
[6] *See Second Order on Reconsideration* at 4119 ; 47 C.F.R. § 76.922(b).
[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.
[8] *Id.*
[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.
[10] 47 C.F.R. § 76.953(b). Complaints about rates in effect on September 1, 1993 must be filed by February 28, 1994. 47 C.F.R. § 76.953(a). Each of the complaints addressed in this order was filed after February 28, 1994.
[11] *See* 47 U.S.C. § 522.

have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission.

7. As for CVI's a la carte packages, we conclude that those packages are not subject to rate regulation. The a la carte packages at issue in the instant cases involve 3 channels which were moved from previously regulated tiers of service and replaced by other channels. In our earlier orders resolving letters of inquiry, we have determined that similarly constituted packages, created at a time when our rules did not provide clear guidance regarding the regulatory status of a la carte packages, could be treated as new product tiers that may be priced at market levels.[12] We will apply the principles developed in those decisions to this case and permit CVI to treat its a la carte packages in the subject communities as new product tiers.

## ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the complaints set forth in Appendix A ARE DISMISSED.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Bureau Chief
Cable Services Bureau

## Appendix A

| CUID No. | 1Date Complaint Filed with FCC |
|---|---|
| NY0268 | 3/28/94 |
| NY0356 | 03/10/94 |
| NY0397 | 03/25/94 |
| NY0440 | 03/10/94 |
| NY0492 | 05/09/94 |
| NY0502 | 03/16/94 |
| NY0503 | 03/21/94 |
| NY0514 | 03/03/94 |
| NY0515 | 03/15/94 |
| NY0600 | 03/01/94 |
| NY0717 | 03/28/94 |
| NY0721 | 03/14/94 |
| NY0782 | 03/01/94 |
| NY0788 | 03/21/94 |
| NY0928 | 03/28/94 |
| NY1088 | 03/04/94 |
| NY1394 | 03/03/94 |

[12] *See, e.g., Cablevision Industries, Wake Forest, North Carolina,* LOI 94-7, DA 94-1550 (Cable Services Bureau, released December 22, 1994); *Comcast Cablevision, City of Tallahassee, Florida,* LOI 93-2, DA 94-1275 (Cable Services Bureau, released November 18, 1994).

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of the Application of | ) | |
| | ) | |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA | ) | File No. W-P-C-6834 |
| | ) | |
| For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone within a geographically defined trial area in northern Virginia | ) | |

**ORDER AND AUTHORIZATION**

**Adopted:** January 11, 1995 **Released:** January 20, 1995

By the Commission:

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## I. INTRODUCTION

1. In the VDT Orders,[1] the Commission determined that video dialtone[2] would enable local telephone companies to participate in the video marketplace, consistent with the statutory telephone

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1 The Commission adopted its video dialtone policies in Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (First Report and Order), recon., 7 FCC Rcd 5069 (1992), aff'd. National Cable Television Association v. FCC, No. 91-1649 (D.C. Cir. August 26, 1994) (NCTA v. FCC); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, at 5783 (1992) (VDT Order); Memorandum Opinion and Order on Reconsideration And Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, RM-8221 (FCC 94-269), released November 7, 1994 (VDT Reconsideration Order), appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992) (together, the VDT Orders).

Pursuant to the VDT Orders, the Commission has approved six commercial applications, New Jersey Bell Telephone Company, 9 FCC Rcd 3677 (1994) (NJB-Dover); and Ameritech Operating Companies, FCC 94-340 (released January 4, 1995); and eight applications for video dialtone trials, as follows: The Chesapeake and Potomac Telephone Company of Virginia, 8 FCC Rcd 2313 (1993) (BA Technical Trial Order); New York Telephone, 8 FCC Rcd 4325 (1993) (NYT Trial); Southern New England Telephone, 9 FCC Rcd 1019 (1993) (SNET Initial Trial Order); U S West Communications, Inc, 9 FCC Rcd 184 (US West Initial Trial Order); and Rochester Telephone Company, 9 FCC Rcd 2285 (1994) (Rochester Trial); Southern New England Telephone Company, FCC 94-297 (released November 22, 1994) (SNET Amended Trial Order); Puerto Rico Telephone Company, DA 94-1384 (released December 5, 1994); U S West Communications, Inc., FCC 94-350 (adopted December 23, 1994) (US West Amended Trial Order); and Carolina Telephone and Telegraph Company, DA 94-1593 (released December 28, 1994).

2 In the VDT Order, we defined "video dialtone" as the provision of a basic common carrier platform to multiple video programmers on a non-discriminatory basis. A "basic platform" is a common carrier transmission service coupled with the means by which customers (end users) can gain access to any or all video programming carried on that platform. VDT Order at 5783, para. 2.

company-cable television cross-ownership restrictions.[3] The Commission also determined that carriers must file a Section 214 application before constructing video dialtone facilities.[4]

2. Before the Commission is the request of the Chesapeake and Potomac Telephone Company of Virginia ("C&P"), now Bell Atlantic - Virginia ("BA")[5] to extend and amend its existing Section 214 authorization which permits it to provide video dialtone services on a trial basis.[6] In its Request for Extension and Amendment ("Extension Request"), BA asks the Commission for authority to convert its technical trial into a market trial for the provision of video dialtone services to a larger number of households in northern Virginia for a period of six months or until a commercial video dialtone service is approved in the trial service area. Invoking the injunction it has secured against enforcement by the United States of the statutory telephone company-cable television cross-ownership restriction codified at 47 U.S.C. § 533(b),[7] BA also proposes to provide video programming through an affiliate over this video dialtone platform.

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3 See supra note 1.

4 VDT Order at 5820, para. 72. Generally, Section 214 requires Commission authorization before a carrier extends a new line of interstate communication. For Section 214 purposes, a "line" means "any channel of communication established by appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels." 47 U.S.C. § 214(a).

5 C&P changed its name after it filed this application with the Commission.

6 The Chesapeake and Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313 (1993) (BA Technical Trial Order).

7 Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993) aff'd., No. 93-2340 (4th Cir. Nov. 21, 1994)(C&P v. U.S.). Four other federal district courts in four other circuits also have found the statutory cross-ownership restriction unconstitutional. See U S West, Inc., et al. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994) aff'd, No. 94-35775 (9th Cir. Jan. 3, 1995); BellSouth Corporation, et al. v. U.S., No. CV 93-B-2661-S, slip op. (N.D. Ala. Sept. 23, 1994); Ameritech Corporation, et al. v. United States, No. 93 C 6642, slip op. (N.D. Illinois, October 27, 1994); NYNEX Corporation v. United States, No. 93-323-P-C, slip op. (D. Me. Dec. 8, 1994).

3. The National Cable Television Association, Inc. ("NCTA"), on its own, and Adelphia Communications Corporation and Jones Intercable of Alexandria, Inc., filing jointly ("Adelphia/Jones"), filed petitions to deny, and USA Video Corporation ("USA Video"), a video programmer planning to participate in BA's video dialtone platform, filed comments. BA filed an opposition to the petitions to deny, and Adelphia/Jones filed a reply. On November 21, 1994, NCTA filed a Motion to Dismiss BA's application. BA filed an opposition, and NCTA filed a reply and Adelphia/Jones and Comcast Cable Communications, Inc. ("Comcast") filed a joint reply. Comments also were filed by the United States Telephone Association ("USTA").

4. For the reasons set forth below, we grant BA's market trial request, and permit it to provide video programming through its affiliate Bell Atlantic Video Services ("BVS") for the duration of the trial, subject to the conditions and requirements specified below, which are designed to protect the interests of independent video programmer-customers, video dialtone subscribers, and telephone ratepayers. Thus, BA may begin constructing the video dialtone facilities covered by this application, and, upon commencement of the trial, it may provide its own programming over the platform pursuant to the terms of this authorization. We believe this action represents an appropriate response to the injunction issued by the district court at the time it found the statutory telephone company cable television cross-ownership restrictions unconstitutional.[8] Pending the development of permanent safeguards, we would be inclined to give effect to any applicable court decision by permitting local exchange carrier (LEC) trials which include provision of video programming over their own platforms pursuant to the programming safeguards adopted in this Order, unless the parties make a strong showing that additional safeguards are required with respect to a particular trial application.

5. Additional or different safeguards may be required to protect the public interest to the extent that carriers provide video programming on permanent, commercial video dialtone platforms, as well. Such measures could potentially include Title VI requirements, as well as additional Title II safeguards. We intend to decide such issues in a rulemaking proceeding we are initiating[9] and will complete expeditiously,[10] although we may also

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8 See n.7 supra.

9 Sunshine Announcement, January 5, 1995, "FCC To Hold Open Commission Meeting Thursday, January 12, 1995," FCC Daily Digest, January 5, 1995 ("Sunshine Announcement").

proceed in the interim on a case-by-case basis. BA will be fully subject to any rules of general applicability the Commission adopts in the upcoming rulemaking governing LEC provision of video programming over video dialtone platforms.

## II. BACKGROUND

### A. Technical Trial

6. In the BA Technical Trial Order, of March 25, 1993, the Commission approved BA's trial of video dialtone to be conducted in northern Virginia, subject to certain conditions. That Order granted BA authority to test an Asymmetric Digital Subscriber Line ("ADSL") technology for one year to the homes of up to 400 Bell Atlantic employees in BA's Arlington, Virginia telephone service area.[11]

7. ADSL is an all-digital system that permits the transmission of a one-way compressed video signal and two-way voice and data signals on an integrated basis over existing copper loop facilities.[12] An end-user's request for particular video programming is transmitted through the system to a switch, which summons the requested digitized programming from a video server computer. The switch then transmits the programming to the end-user. ADSL capacity is not described in terms of numbers of channels, because ADSL does not operate like a traditional cable system, with multiple channels delivered simultaneously to every subscriber. Instead, ADSL provides only the particular programming chosen by the consumer at the time it is chosen. Technically, the transmission to the end-user is over a single channel, but the range of programming potentially available is limited only by the capacities of the video switch and the video server.[13]

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10 We will give further consideration to the issue of whether additional or different safeguards are required for technical or market trials in this rulemaking.

11 BA Technical Trial Order at 2317. BA has filed two reports on the operation of the technical trial--on September 27, 1993, and October 24, 1994.

12 ADSL therefore offers video dialtone network designers the advantage of using existing transmission facilities, and of avoiding the expense and disruption of new facilities installation.

13 Extension Request at 9.

8. The video switch has two types of ports, or connections. One type of port is a programmer port, linking the switch to a programmer's video server. The other type of port is an end-user port, linking the switch to an end-user. The video switch BA will be using permits a ratio of up to four potential end-user ports for each programmer port. However, a programmer port can transmit to only one end-user port at a time.[14]

**B. Market Trial Application**

9. In its Extension Request, BA seeks permission to expand the existing trial authority to allow construction of ADSL facilities to as many as 2000 households in the northern Virginia portion of the Washington Local Access Transport Area ("LATA"). The 2000 households include all of the "approximately 300" employees who are participating in the technical trial and who wish to continue with the market trial.[15] As in the technical trial, transmissions of telephony, data and video will be integrated, and video programming will be ordered over the system on an "on-demand" basis. The market trial, however, will be tariffed, with non-recurring and monthly charges to both programmer-customers and the subscriber end-users. BA proposes that its subsidiary, BVS, be included among the programmers. BA will provide a regulated level-one gateway that "permits trial participants to access any programmer that offers service during the trial," and that also provides access to unregulated level-two gateway providers.[16]

10. "[T]o promote programmer participation" in the expanded trial, BA conducted an "open enrollment period" through year-end 1993.[17] During this period, interested programmers and level two gateway providers submitted service applications designating the number of programmer ports they wish to lease and the number of end-user subscribers they wish to serve.

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14 Thus, a programmer who leases 100 programmer ports could be linked to four hundred different end-users, although not all at the same time. In this example, if all 100 of the programmer ports are engaged at any particular time, the 101st end-user attempting to engage the video switch will be blocked, and receive a "busy signal."

15 Extension Request at 3.

16 Id. at 3-4.

17 Id. at 12.

11. Under BA's proposal, no single programmer may lease more than 500 of the 1000 programmer ports available for the trial. Programmers also will be limited to two end-user ports for each programmer port that is leased, so as to minimize blocking when end-users attempt to engage the programmer-ports. BA states that "[t]he limit of two end-users ... for each programmer port leased will ensure a fair allocation of the limited number of ports ... during the trial, and is limited to the market trial only." "In a later commercial deployment, it will be up to the programmers to determine this ratio depending on their own traffic engineering requirements."[18] In the event programmers apply for more ports than are available, BA states that the ports will be proportionally allocated. Any excess facilities will be available after the enrollment period on a first-come, first-served basis.[19]

12. BA states that it will provide all network facilities and equipment, and will provide ADSL terminal units at both ends of the existing loops that serve the trial participants.[20] Where requested by a programmer-customer, BA also may install and maintain premises inside wiring. BVS, on the other hand, will not be providing the ADSL terminal units, but upon request, and for a fee, BVS will provide end-users who subscribe to its service with set-top decoders and inside wiring. The BVS-supplied equipment "will not limit the ability of end users to obtain access to any services offered over the level one gateway;" nor will the equipment restrict end users "to using just those services offered by BVS."[21] In addition, other qualified vendors, or the end-users themselves, may provide inside wiring and equipment.[22]

13. BA argues that its proposal would serve the public interest and necessity because it would test programmer and end-user demand for ADSL video dialtone under actual market conditions. BA states that valuable traffic engineering data would be generated, and the efficiency of the equipment used also would be tested.[23]

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18 Id. at 12 n.13.

19 Id. at 13.

20 Id.

21 Id.

22 Id. at 13-14, n.15.

23 Extension Request at 3, 15.

## III. DISCUSSION

### A. Overview

14. Bell Atlantic's proposal raises three major issues: (1) may Bell Atlantic, through its affiliate, provide video programming over its northern Virginia video dialtone platform; (2) does Bell Atlantic's extension request otherwise satisfy the existing video dialtone rules; and (3) does Bell Atlantic's extension request satisfy the requirements of Section 214?

### B. Bell Atlantic Provision of Video Programming

#### 1. Contentions of the Parties

15. NCTA and Adelphia/Jones argue that BA's proposal to provide video programming directly to subscribers using its video dialtone system in its telephone service area is inconsistent with our video dialtone rules.[24] They argue that our video dialtone rules prohibit telephone companies from providing video programming directly to subscribers, and that BA proposes to provide programming in violation of this rule.[25] In addition, they argue that BA's proposal amounts to a regulatory scheme "neither contemplated nor currently authorized by the Commission's Rules."[26] They argue that, regardless of how the proposal is viewed, so long as carrier provision of programming is present, the application must be denied.[27]

16. As an additional ground for denial, NCTA and Adelphia/Jones argue that BA's proposal to provide video programming directly to subscribers would violate Title VI of the Communications Act because BA does not have a cable operator's franchise.[28] They argue that, to the extent BA provides video programming directly to subscribers through its video dialtone

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24 NCTA Petition to Deny ("NCTA Petition") at 5, citing 47 C.F.R. §63.54(d)(2); Adelphia/Jones Petition to Deny ("Adelphia/Jones Petition") Summary at 2, Text at 3-4, 12-13, 15-20; Adelphia/Jones Joint Reply to Opposition ("Adelphia/Jones Reply") at 3-5; NYT Trial, at 4327, 4328 (1993); and SNET Initial Trial Order, at Section 21(c)(1993).

25 Id.

26 Id. at 12.

27 Id.

28 NCTA Petition at 5, citing 47 U.S.C. §§ 541(b)(1), 542-544, 551, 552, 554.

system, BA is a "cable operator" providing "cable service."[29] They argue, in particular, that BA is not exempt from regulation under Title VI pursuant to Section 602 of the Act, which provides that facilities of a common carrier are not cable systems, unless such facilities are used in the provision of video programming.[30] They contend that the fact that BA and BVS are separate corporations does not affect the need for a cable franchise.[31]

17. NCTA adds that, because of BVS's presence on the platform, additional safeguards are called for to prevent discrimination and cross-subsidization. NCTA notes that the Federal court in C&P v. U.S. recognized "that the Commission certainly could impose additional safeguards on BA's activities short of an outright ban," and "suggested that there are 'an entire range of effective alternatives.'"[32] Adelphia/Jones also allege that additional safeguards are needed because BA has proposed a new regulatory regime that is not video dialtone, and the Commission has not yet worked out the rules for such a regime.[33]

18. BA maintains that the presence of BVS on the platform does not convert the service offering from video dialtone to cable service or some other type of offering. The elements of video dialtone are present, argues BA, since multiple programmers are provided nondiscriminatory access to a basic video dialtone platform.[34] BA argues that BVS is present merely as another programmer and its presence does not change the nature of the fundamental video dialtone service.[35]

19. BA also denies that Title VI would apply to its provision of video programming over a video dialtone system. It argues that the provisions of Title VI and Title II are either redundant or inconsistent, and that it therefore makes no sense to apply both

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29 Id. at 3; Adelphia/Jones Petition at 16, 18; Adelphia/Jones Reply at 11.

30 NCTA Petition at 4.

31 Adelphia/Jones Reply at 11.

32 Id. at 6, citing C&P v. U.S. at 931 n.33.

33 Id. at 14.

34 Opposition of C&P to Petitions to Deny and Reply Comments ("Opposition") at 5.

35 Id. at 5-6.

regimes.[36] BA argues that neither BA nor BVS requires a franchise under Title VI because neither meets the Title VI definition of a "cable operator."[37] BA states that its video dialtone facilities do not fulfill the Title VI definition of a "cable system," and that it is not engaged in the Title VI definition of "transmission."[38] BA argues that BVS does not even have video dialtone facilities, much less cable facilities, because BVS and BA are separate corporate entities and will operate as such. BA contends that "BVS will have no ownership interest in, and will have no involvement in the management or operations of, the video dialtone platform."[39] Finally, BA argues that section 602 was intended to apply only when a telephone company provides conventional cable service -- i.e., when it exercises control over who has access to its facilities.[40]

20. BA adds that additional safeguards are not required because "[t]he Commission has repeatedly found that its existing safeguards adequately protect against the possibility of anticompetitive conduct in the provision of information services."[41] Moreover, BA states that additional protection will be present because BVS is a separately incorporated entity with its own books of account.[42] Therefore, BA contends that "any costs incurred to provide video programming will be reflected on the books of BVS, and any loss incurred will be borne solely by its shareholders."[43] BA also states that BVS "will purchase tariffed video dialtone service from C&P on the same, non-discriminatory terms and conditions as all other programmers."[44]

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36 Opposition of C&P to Petitions to Deny and Reply Comments ("Opposition") at 5, 11-12.

37 Id. at 12-14.

38 Id.

39 Opposition at 14.

40 Opposition at 12, citing Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 5069, at 5072 (1992)("Reconsideration of 1991 Order"), and p. 41 of Respondents Brief ("FCC Appellate Brief") in National Cable Television Ass'n v. FCC, 33 F. 3d 66 (D.C. Cir. 1994).

41 Opposition at 7, citing Computer III Remand Proceedings, 6 FCC Rcd 7471, 7576 (1991).

42 Id. at 8.

43 Id.

44 Id.

## 2. Discussion

21. Under the present circumstances, we conclude that BA should be permitted to provide video programming directly to subscribers over its own video dialtone platform for this trial of limited geographic scope and duration. Our current video dialtone rules prohibiting provision of video programming by telephone companies were developed in light of the application of the cross-ownership provisions of the 1984 Cable Act. As previously mentioned, the Fourth Circuit has affirmed the District Court order enjoining us from applying these provisions of the Cable Act to BA.[45] Although we are initiating a rulemaking proceeding to address generally the terms under which LECs may provide video programming subsequent to the Fourth Circuit decision,[46] we are acting now to allow BA to provide video programming over its video dialtone platform subject to interim safeguards. This authorization will be subject to the outcome of the rulemaking proceeding, however. We believe that this is consistent with the Fourth Circuit decision, and provides necessary protections for the public and other industry participants under the present circumstances. In response to the argument by NCTA and Adelphia/Jones, we recognize that BA's provision of video programming over its video dialtone platform is inconsistent with our existing video dialtone rules. Nevertheless, in light of the injunction, as well as the safeguards we adopt here, we waive our video dialtone rules to the extent necessary to permit BA to provide programming over its platform for the duration of the trial consistent with this order.

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45 Contrary to the contentions of certain parties opposing this application, we conclude that BA's proposal to provide video programming over its video dialtone platform does not transform its video dialtone service into a new kind of offering for which we cannot or should not issue this authorization under Section 214. This conclusion in no way prejudges our decision in the upcoming rulemaking proceeding regarding the applicability of Title VI if LECs provide programming over their video dialtone platforms.

46 Sunshine Announcement.

22. Pending the resolution of the rulemaking, BA's provision of video programming will be subject to existing safeguards for the provision of nonregulated services, including enhanced services.[47] We agree with NCTA and Adelphia/Jones that additional interim

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47 The BOCs are subject to a comprehensive regulatory framework for the provision of enhanced services designed to protect against discrimination and anticompetitive conduct. For present purposes, under the circumstances of this trial, the provision of video programming by BA constitutes an enhanced service under Section 64.702(a) of our rules. The safeguards against cross subsidization include accounting and cost allocation rules to separate enhanced and other nonregulated service costs from regulated service costs. The nondiscrimination safeguards include: 1) ONA requirements that ensure that enhanced service providers are able to obtain nondiscriminatory access to basic BOC services; 2) customer proprietary network information requirements that limit access of BOC enhanced services marketing personnel to CPNI if a customer requests, and require that for customers with more than twenty access lines the BOCs must obtain prior customer authorization before gaining access to CPNI; 3) network disclosure rules that ensure that enhanced services providers have access to information about network changes that could affect their interconnection of enhanced services to the network; and 4) nondiscrimination reporting requirements to ensure that BOCs do not discriminate in the quality, installation and maintenance of basic services provided to certain enhanced service providers. See Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order). We note that the United States Court of Appeals for the Ninth Circuit recently remanded in part the BOC Safeguards Order, on the ground that the Commission had not adequately explained how, without full unbundling of BOC networks under ONA, access discrimination could be prevented in the absence of structural safeguards. California v. FCC, 39 F.3d 919 (9th Cir. 1994). The Common Carrier Bureau has issued an interim waiver, effective upon issuance of the Ninth Circuit's mandate, permitting the BOCs to offer integrated enhanced services (including video dialtone-related enhanced services) pursuant to certain conditions, while the Commission conducts remand proceedings. Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (Common Carrier Bureau, January 11, 1995). Under the terms of the waiver, BOCs must comply with our market trial notification procedures before commencing market trials of new enhanced services, and must receive approval of service-specific Comparably Efficient Interconnection (CEI) plans before offering any new enhanced service on a commercial basis.

safeguards are appropriate. There are several additional interim safeguards that we will impose on the grant of this authorization in order to protect the public interest in light of BA's provision of video programming.[48] We address specific arguments concerning the need for particular additional safeguards in subsequent sections of this Order. To the extent that it provides any marketing, promotional, or sales referral services to its affiliate BVS in connection with this market trial, BA must offer such services to all other video information providers participating in the market trial on the same terms and conditions. In connection with the market trial, BA is also required to offer transport service, interconnection, and interoperability for unaffiliated video programmers that are equivalent to that provided to its affiliate BVS. Finally, BA shall submit to the Commission copies of all promotional materials and descriptions of all marketing activities directed at encouraging video information providers to use BA's video dialtone service. As a supplement to existing safeguards governing BA's provision of enhanced services, these measures should provide significant protection against potential discrimination in favor of BVS and ensure that BA actively seeks unaffiliated video programmers.

23. We believe that these conditions, pre-existing requirements applicable to LEC provision of enhanced services, and the other measures adopted in this order will provide sufficient protection against anticompetitive behavior during this market trial in light of BVS's provision of video programming. BA will be required to comply with whatever permanent requirements the Commission adopts in the upcoming rulemaking pursuant to Titles I, II and/or VI of the Communications Act. Our decision today in no way presages or prejudges the issue of what permanent safeguards the Commission should attach in the event that LECs provide video programming over video dialtone platforms.

24. We do not address, at this time, the issue of whether BA will need to obtain a franchise or otherwise comply with Title VI requirements for it to provide video programming over its video dialtone platform through an affiliate. Thus, we are not here precluding cities from independently evaluating the applicability of Title VI. It will be up to BA to weigh the risks involved in proceeding without obtaining a cable franchise and determine how to proceed. We intend to request comment on the issue of whether a LEC that seeks to provide video programming services on its own or through an affiliate must obtain a cable franchise, or otherwise comply with Title VI requirements, in the rulemaking we are

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48 Section 214 of the Act gives the Commission authority to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c).

initiating. As noted above, BA will be fully subject to the outcome of that rulemaking proceeding.

**C. Video Dialtone Issues**

**1. Overview**

25. The current rules require that local telephone companies offering video dialtone service make available a basic common carrier platform to multiple video programmers on a nondiscriminatory basis, and provide a means by which customers can access any and all of the video programming offered.[49] The platform must have "sufficient capacity to serve multiple video programmers."[50] The basic platform must also be available on a nondiscriminatory, unbundled basis, so that unaffiliated service providers may offer non-regulated or enhanced services in competition with any telephone company-provided non-regulated services.[51] A significant number of the arguments raised by interested parties concerning compliance with our video dialtone requirements relate to the proposed presence of BVS as a video program provider.

**2. Capacity**

**a. Contentions of the Parties**

26. Adelphia/Jones challenge both BA's proposal to provide only one video switch and the allocation scheme by which BA plans to make available the capacity on that switch. Adelphia/Jones argue that "[p]rior Commission authorizations of video dialtone trials have ... required telephone companies to specify how they will expand capacity to satisfy future demand."[52] Adelphia/Jones maintain that "C&P makes no provision for additional ports in the event of an excess post-enrollment period demand therefor."[53] Adelphia/Jones then challenge BA's plan to have a limited enrollment period during which programmers make requests for server

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49 Second Report and Order, 7 FCC Rcd at 5783, 5797, paras. 2, 29; see VDT Reconsideration Order at 16-17, paras. 30-33.

50 Second Report and Order, 7 FCC Rcd at 5797, para. 29; VDT Reconsideration Order at 16, para. 33.

51 Second Report and Order, 7 FCC Rcd at 5831, para. 94.

52 Adelphia/Jones Reply at 7.

53 Adelphia/Jones Petition at 8, note 19.

ports.[54] They argue that "an arbitrary enrollment deadline precludes any accommodation of new users and is patently inconsistent with common carriage."[55] In fact, Adelphia/Jones argue, "a requirement that parties must order service even before the service is available is prima facie unreasonable."[56] Adelphia/Jones state that the Commission has rejected another LEC's plan to pre-allocate one-third of its platform to itself, while here BVS may be taking up to half of the capacity.[57] Finally, Adelphia/Jones contend that the proposed limitation of two end-user ports to each programmer port "[has] the practical effect of limiting access for other, non-affiliated programmer-customers," because it "directly limits the number of customers that each programmer can have."[58] They argue that, since BVS can have up to one-half the capacity, the effect is to limit non-affiliated programmers to the other half and therefore to discriminate in favor of BVS.[59] Adelphia/Jones add that BA does not adequately explain how available ports will be reallocated in case of a shortfall in capacity and how many ports BVS will, in fact, have.[60]

27. BA states that the reason for the open enrollment period is "because of the limited nature of the trial, and to ensure that all interested parties would have an opportunity to participate ...."[61] BA asserts that "the video dialtone platform for the trial provides sufficient capacity to serve multiple programmers...."[62] In an ex parte statement, BA states that six programmers have enrolled for the service, and that 582 of the 1000 programmer ports are reserved, leaving available forty-two percent of the capacity

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54 Id. at 7.

55 Id. (footnotes omitted).

56 Id. at 8.

57 Id. at 7 & 9, citing US West Initial Trial Order.

58 Adelphia/Jones Petition, Summary at 1, Text at 7-9.

59 Id.

60 Id.

61 Opposition at 4.

62 Extension Request at 4. BA had previously stated that thirteen programmers enrolled. Eventually, however, several of the programmers withdrew their expression of interest.

for additional programmers.[63] No one programmer, including BVS, could have more than fifty percent of the total capacity.[64] BA states that, if excess demand developed during the enrollment period, the ports "will be proportionately allocated among the programmers who have applied to participate...."[65] BA also states that any surplus capacity will be filled after the enrollment period on a nondiscriminatory first-come, first-served basis, subject to the condition that no one programmer may have more than fifty percent of total capacity. Finally, BA states that the video dialtone service will be offered "under tariff ... on non-discriminatory terms and conditions."[66]

**b. Discussion**

28. A video dialtone service must offer a basic common carrier platform that provides nondiscriminatory access to multiple programmers, and its capacity must be able to expand to accommodate increasing demand so as not to become a bottleneck.[67] In the VDT Reconsideration Order, the Commission clarified its policy to specify that LECs are required to expand their capacity in the event of a shortfall "whenever, and to the extent that, expansion is technically feasible and economically reasonable."[68] In the recently issued Omaha Amended Trial Order, the Commission reiterated the factors it would take into consideration in reviewing, on a case-by-case basis, proposals to provide sufficient capacity in the context of trials.[69] Those factors, first stated in SNET Initial Trial Order, include: (1) the initial capacity available; (2) the ability to expand this capacity; (3) the demand for capacity; and (4) the proposed duration of the offering in the case of applications to provide video dialtone on a trial basis.[70] In most video dialtone trials to date, the Commission has required

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63 C&P (Bell Atlantic) ex parte letter to William F. Caton, Acting Secretary of the Commission, dated December 23, 1994. ("BA December 23, 1994 Ex Parte Letter")

64 Id.; Extension Request at 12.

65 Id. at 13.

66 Extension Request at 4, 13, note 14.

67 VDT Order at paras. 2, 29, 30.

68 VDT Reconsideration Order at ¶ 38.

69 Omaha Amended Trial Order at ¶ 17.

70 Id.; SNET Initial Trial Order at 1022 n.46.

that the applicant undertake at least "reasonable steps"[71] to expand capacity, or explain why expansion is not technically feasible or economically reasonable.[72] If a shortfall in capacity is anticipated or experienced, the carrier is under specific requirements to notify the Commission.[73]

29. Applying these criteria to the instant trial, we conclude that BA's proposal to deploy a single video switch for this trial is sufficient to satisfy the requirements of the VDT Orders, and that it appears economically unreasonable to require BA to expand beyond this to provide additional capacity at this time. Prospective programmers have committed to take less than sixty percent of the capacity of the current switch. According to BA's equipment cost estimates, the cost of an additional server would be approximately $1.7 million.[74] Given the limited duration of the trial and the substantial excess capacity currently available, the cost of requiring BA to provide additional capacity appears to exceed any benefits.

30. We condition this authorization, however, on the requirement that BA inform the Commission of any actual or anticipated shortfall in capacity. Therefore, BA shall report to the Chief of the Common Carrier Bureau, within thirty days of an anticipated capacity shortfall, or within five days of denying any video programmer access to the platform due to capacity limitations, in whole or in part.

31. We conclude that, under the current circumstances, permitting any one programmer, including BVS, to use up to fifty percent of the capacity appears reasonable. The Commission has held in a previous trial that pre-launch allocations are not inherently inimical to the principles of common carrier nondiscrimination, so long as the remaining capacity is sufficient to serve multiple video programmers.[75] After the capacity that all current programmers use is taken into account, over forty percent of the total video switch capacity remains available for additional programmers. BA's proposal is only for a trial, not for a permanent commercial service. Under these circumstances, a

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71 NYT Trial at ¶ 28(e).

72 SNET Initial Trial Order at ¶ 21(d); Rochester Trial at ¶ 17(f); US West Initial Trial Order at ¶ 35(h); SNET Amended Trial Order at ¶ 58(f).

73 Id.

74 Extension Request at Exhibit 3.

75 NYT Trial at ¶ 15; see also Rochester Trial at ¶ 13.

fifty-percent capacity cap would allow a large programmer to offer a broad range of programming, while preserving access to the platform for multiple other programmers.

32. We also conclude that the enrollment period and procedures proposed by BA are not unreasonable for this trial. For the trial to begin, programmers need to express an interest to the carrier, and subsequently decide whether or not to participate in the trial. It appears reasonable for such arrangements to be concluded in advance to permit the carrier to prepare for the launching of the trial. An announced enrollment period appears to be a reasonable mechanism for addressing these requirements. The enrollment period has expired, and there is substantial excess programmer capacity on the video switch. BA has committed to make this capacity available to interested parties on a nondiscriminatory first-come, first-served basis, subject to the requirement that no one programmer, including BVS, may have more than fifty percent of total capacity.[76]

33. Further, we conclude that BA's proposal to establish a limit of two end-user ports for each programmer port appears reasonable within the confines of the proposed trial. BA has concluded that, in order to accurately test end-user interest in video programming over an ADSL system, end-user blockage should be minimized. This conclusion appears reasonable, particularly in view of its limitation to the period of the market trial.

### 3. Discriminatory Provision of Video Dialtone Equipment Information

#### a. Contentions of the Parties

34. USA Video states that it is concerned that BA may exercise a bias toward BVS by providing BVS with advance information on platform specifications.[77] In particular, USA Video states that BA has not made available to USA Video the specifications of "ADSL Vendor and Message Type Codes" that are necessary for USA Video to plan its participation in the platform.[78] USA Video suggests that the Commission ask BA when such information was made available to BVS.[79]

35. BA responds that, at the time USA Video filed its comments, BA already had provided programmers with the interface

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76 Extension Request at 13, note 14.

77 Comments of USA Video Corp. ("USA Video Comments") at 2-4.

78 Id. at 2.

79 Id. at 3.

specifications, including the codes, so that programmers could test their servers and set-top boxes.[80] BA says that, although it is not required to do so, it has made available to programmers the names of the three ADSL vendors under consideration by BA. BA states that subsequently it has made available the eight-bit binary codes that will be used when the system becomes operational.[81] BA states that the information is made available in Bell Atlantic network services technical releases to programmers who request them.[82]

**b. Discussion**

36. We decline to pursue USA Video's suggestion that the Commission inquire into the timing of the release of Vendor and Message Type Code information to BVS. BA states that all such information has been made available to all qualifying programmers. USA Video has not demonstrated that it has been harmed by either the timing or nature of this information release in the present circumstances. To ensure that problems do not arise in the future, we condition this order on the requirement that BA provide all video programmers with nondiscriminatory access to technical information concerning the basic video dialtone platform and related equipment.

**4. Miscellaneous**

37. In an ex parte letter filed in both the VDT Reconsideration Order proceeding and in this proceeding shortly before we addressed various petitions for reconsideration in the rulemaking proceeding, NCTA raised a wide range of general video dialtone cost, pricing and cross-subsidy issues.[83] We addressed those issues in the VDT Reconsideration Order.[84] In the letter, however, NCTA also specifically argued that Bell Atlantic should not be permitted simultaneously to pursue this market trial application and its other pending commercial video dialtone applications.[85] As we conclude below, the public interest does not require that a telephone company exclusively pursue either trial

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80 Id. at 9.

81 Id.

82 Id. at 10, note 25.

83 NCTA October 12, 1994 letter to James Casserly, Senior Legal Advisor, Office of Commissioner Ness, Federal Communications Commission, at pages 4-11. ("NCTA Letter").

84 VDT Reconsideration Order at ¶ 146.

85 NCTA Letter at 4.

applications or commercial applications.[86]

### 5. Conclusion

38. We find that under its proposal BA will be providing a common carrier platform with sufficient capacity to serve multiple programmers that satisfies the requirements of the VDT Order. There is a platform in the form of a 1000-programmer-port server, which appears to be sufficient capacity to accommodate multiple programmers for the limited duration of this trial. BA commits itself to treating all programmers in a nondiscriminatory manner, and we condition this order on such conduct. All of the programming can be reached by all of the end-user customers. We also note that the ADSL terminals deployed on customer premises, and set-top decoders constitute customer premises equipment (CPE), and that BA will need to comply with the Commission's rules on the provision of CPE. BA must also comply with our requirements concerning the provision of the inside wiring in conjunction with this trial.

## D. Section 214 Issues

### 1. Overview

39. In the Reconsideration of Second Report and Order, the Commission affirmed its decision to require that local telephone companies obtain approval pursuant to Section 214 of the Communications Act before beginning construction of video dialtone facilities or offering video dialtone service.[87] Section 214(a) requires a carrier to obtain certification before constructing or extending a line it will use for interstate communications. It has become clear through the Section 214 application process for video dialtone that local telephone companies will use video dialtone systems for interstate communications, including delivering video programming transmitted by means of radio waves. Before the Commission can grant a Section 214 authorization, it must determine that a grant would serve the "public convenience and necessity."[88] The courts have granted the Commission significant latitude in making its determinations under Section 214.[89]

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86 See ¶¶ 44 and 45 infra.

87 VDT Reconsideration Order at 66, paras. 136-137.

88 47 U.S.C. § 214(c).

89 Century Federal, Inc. v. FCC, 846 F.2d 1479 (D.C. Cir. 1988); General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). In General Telephone Company of the Southwest, the court noted that "'[t]he Commission is not

40. Generally, trials are tests of a controlled experimental nature that are typically limited in duration and in scope. The Commission has previously held that "a trial [application for video dialtone], by definition, is not generally susceptible to the same level of precision" as an application for permanent, commercial video dialtone service.[90] An application for commercial video dialtone service must contain a greater level of specificity.[91] The reasoning behind this policy is that the potential benefits that may be realized by conducting limited trials may outweigh perceived risks created by subjecting video dialtone trial applications to less scrutiny. We find that the public interest is served by approving applications for limited video dialtone trials, but that it is nonetheless necessary to impose certain conditions on trial authorizations designed to protect the interests of telephone ratepayers, video customer-programmers, and video dialtone end-users.

**2. BA's Request for Market Trial**

41. According to BA, the market trial would provide useful data about the following: (1) access demands on the system under actual market conditions; (2) the willingness of programmers to provide on-demand services, and of subscriber end-users to pay for such services; (3) tests of other services provided by programmers and other information providers; (4) the efficacy of the system's end-user interface equipment, such as set-top boxes; and (5) traffic engineering requirements for commercial deployment of video dialtone.[92] BA states that expenditures for the trial are justified by "the knowledge that will be gained by BA during the proposed trial, and the demonstration of market feasibility of providing video dialtone over existing loop facilities."[93] No petitioners or commenters challenged the cost figures or other economic basis for

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required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. . . . [B]ut the Commission must at least warrant . . . that competition [resulting from the grant] would serve some beneficial purpose . . . .'" General Telephone Company of the Southwest, 449 F.2d at 858 (citing FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953)).

90 New York Tel. Co., 8 FCC Rcd at 4330, para. 26; see U S WEST Communications, Inc., 9 FCC Rcd at 188, n.57.

91 See New York Tel. Co., 8 FCC Rcd at 4330, para. 26.

92 Extension Request at 3, 15.

93 Id. at 15.

the proposed trial. Nevertheless, parties raised several specific arguments challenging BA's assertion that the proposal would serve the public interest.

### 3. Timing of Action Given Pending Technical Trial

#### a. Contentions of the Parties

42. Adelphia/Jones state that market trial authorization would be premature because the technical trial is still underway and its results are inconclusive.[94] Until the final technical trial results have been submitted and evaluated, any extension of the trial is premature, according to Adelphia/Jones.[95] They also argue that "[t]he Commission conditioned any extensions of BA's trial authorization 'on a showing that an extension is required to further the trial's objectives.'"[96] By contrast, NCTA maintains that, since Bell Atlantic, the parent company of BA, has filed a commercial application for video dialtone service, Bell Atlantic in effect admits that the need for a market trial has been obviated.[97]

43. BA states that, although the technical trial is ongoing, "C&P has proven the technical viability of delivering compressed digital video signals over existing copper loops on an on-demand basis using ... ADSL technology."[98]

#### b. Discussion

44. We do not agree that action on the market trial needs to be delayed pending further information on the technical trial. The LECs are not required to conduct technical or market trials and given that video dialtone is a relatively new service and that there will be technological alternatives for providing it, we find it appropriate to extend considerable latitude to LEC choices in such matters. In this case, BA's technical trial, originally scheduled as a one-year trial, has continued for over eighteen months, and is currently operating under its second six-month extension.[99] BA has issued two interim reports that cover the first

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94 Adelphia/Jones Petition, Summary at 3.

95 Id.

96 Reply at 16-17, citing C&P Technical Trial at 2315.

97 NCTA October 12, 1994, ex parte letter, section I. B.

98 Opposition at 1.

99 See supra, note 1.

year of operation.[100] There is nothing in these reports to suggest that an expansion of the technical trial into a market trial is contrary to the public interest. The final report on the technical trial still must be filed to complete the record after the technical trial has ended, but it is not a prerequisite to expansion into the next phase of testing.

45. We also conclude that, while a market trial is not a prerequisite to a commercial filing, neither does the mere filing of a Section 214 application for a commercial service render a planned market trial moot. Nor is the fact that BA could terminate the market trial in less than six months, if the commercial service becomes available to the same service area, fatal to BA's proposal. As previously stated, we believe that it is entirely consistent with our public policy goals in establishing video dialtone service to extend considerable flexibility to participating carriers on whether to conduct and how to coordinate such trials with the development of commercial offerings. Moreover, we see no reason to believe that BA would initiate a market trial and then discontinue it before obtaining the information that the trial was designed to develop. Video dialtone is such a new a service offering that it is reasonable to conclude that market information from a controlled test environment, for even a short period, could be useful to BA.

46. The Commission's language in C&P Technical Trial, cited by Adelphia, that a trial extension must be shown to "further the trial's objectives" refers to a possible extension of the length of the technical trial, not an expansion of the technical trial into a market trial.[101] The market trial BA now proposes differs significantly from the technical trial, and its authorization must

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100 The latest report indicates that during the second six months of the trial there were 268 participating households. The households used the system an average of 2.6 hours per week, and, according to BA, "[p]articipants were very pleased with the quality and reliability of the service." BA Second Six Months Report, October 24, 1994, Cover Letter, page 1 (Second Six Months Report). Because the trial has limited offerings, BA states that "[p]articipants request more features, more options and a greater selection of movies. Nevertheless, participants feel that the service is better than or comparable to other media (cable, VCR broadcast) and is easy to use." Id. In summary, BA states that it "is very pleased with the results of the technical trial to date, which has clearly demonstrated the technical viability of delivering high-quality pre-recorded video signals over existing copper loop facilities." Id.

101 C&P Technical Trial at ¶ 9.

be determined according to criteria different from the criteria that would be used for a mere extension of the length of the technical trial.

47. BA's original language concerning the length of the proposed market trial was ambiguous. It was not entirely clear whether the market trial is intended to continue until the commercial service is launched, but in no case longer than six months or whether the market trial would continue until commercial service is available to the market trial service area. In a subsequent ex parte letter, BA clarified that its intention was to conduct a six-month market trial.[102] If BA was authorized to provide commercial video dialtone service in northern Virginia at the end of the market trial, the market trial customers would be allowed to switch to the commercial offering without a break in service. BA also states that it planned to extend the market trial for a brief period beyond six months if necessary to avoid a break in service for these customers. Under these circumstances, we will grant the requested market trial authorization for six months from the date the first end-user customer takes service under an effective interstate tariff for the market trial. At the end of this period, BA may extend the trial for a maximum of three months if commercial service for these customers is not yet available. In order to exercise this option, BA must notify the Commission in writing of its intention to extend the trial at least two weeks before the trial would otherwise terminate.[103] We do not believe that it is necessary to establish a mandatory minimum period of time for the marketing trial.

**4. Proposed Tariff**

**a. Contentions of the Parties**

48. USA Video alleges that the sample tariff provided by BA would require a programmer to charge an end-user excessively high rates just to cover transmission costs. Such rates, argues USA Video, would unfairly discriminate against independent programmers and in favor of BVS, since a loss by BVS due to high tariff charges would be offset by higher BA tariff revenues. USA Video states that BA should be required to reduce its proposed rates to affordable market levels. If excess costs are involved, states USA Video, those costs should be borne by BA's shareholders, and not by its customer-programmers. Otherwise, says USA Video, the market

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102 BA December 23, 1994 Ex Parte Letter.

103 We will permit BA to extend the trial multiple times so long as the total extension does not exceed three months. The minimum period for each extension is one month.

trial will not represent a true test of the market.[104]

49. BA responds that any challenges to the tariff should be made during the tariff proceeding that follows this Section 214 authorization. BA also notes that BVS will pay the same tariffed rates as other programmers.[105]

**b. Discussion**

50. Although the Commission has occasionally provided parties with guidance on tariff issues in Section 214 orders in advance of the tariff review process,[106] we believe that addressing rate issues such as those raised by USA Video in this proceeding is premature. Prior to providing service, BA will file tariffs, and cost support information, which will be available to interested parties and subject to review by the Commission staff. USA's presentation should be reserved for the tariff proceeding. As the Commission stated in another Section 214 proceeding, "[a] detailed inquiry into tariff related matters ... would vitiate the distinction between tariff and facilities authorization procedures and would require the Commission to engage in duplicative processes."[107] We, however, require that BVS take video dialtone service pursuant to tariff under the same rates, terms and conditions available to other customer-programmers.

**5. Drug Abuse Certificate**

**a. Contentions of the Parties**

51. Adelphia/Jones state that BA failed to provide the required Anti-Drug Abuse Act certification.[108] BA responds that it did, in fact, file the required compliance statement, on February 16, 1993, in connection with BA's original application for a technical trial.[109] In reply, Adelphia/Jones assert that, under Section 1.2001 of the Commission rules, the Anti-Drug Abuse Act

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104 USA Video Comments at 3.

105 Opposition at 8.

106 See, e.g., Ameritech Operating Companies, FCC 94-340, at ¶ 30, released January 4, 1995.

107 AT&T Request for Authorization to Supplement Existing Lines, W-P-C 5560, Mem. Op. and Order (released March 10, 1986) at para. 8.

108 Adelphia/Jones Petition at 5, note 6.

109 C&P Opposition at 6, note 16.

certification BA filed with its original application does not cover BA's amended application, which is dated November 9, 1993.[110] On March 2, 1994, after the completion of the pleading cycle on the Extension Request, BA filed, by ex parte letter, an anti-drug abuse certificate "to ensure that the record is complete and that the applicant has met all of the requirements of 47 C.F.R. Section 1.2002."[111]

**b. Discussion**

52. Section 1.2002 of our rules reads, in pertinent part: "[i]n order to be eligible for any new, modified, and/or renewed instrument of authorization from the Commission .... all applicants shall certify that neither the applicant nor any party to the application is subject to a denial of Federal benefits ... pursuant to section 5301 of the Anti-Drug Abuse Act of 1988."[112]

53. In this case there has already been an "issuance" of an individual authority, in the form of the authorization granted to BA in the C&P Technical Trial. BA now seeks to expand the authority granted it by the Commission. Any arguable deficiency, however, is remedied by BA's subsequent filing of an anti-drug abuse certificate that relates specifically to the Extension Request.[113]

**6. Section 214 Analysis**

54. We conclude that the public convenience and necessity will be served by granting Section 214 authority to BA for the expansion of its video dialtone technical trial into a market trial in the Northern Virginia service area covered by this request, subject to certain conditions. The Commission has a mandate under the Communications Act to encourage technological innovation in communications and to expedite the introduction of new technology subject to other public interest considerations.[114] Significantly, in the VDT Order, the Commission found that it is in the public interest to encourage trials of video dialtone technology in order to fulfill our goals of promoting an advanced, cost-effective

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110 Adelphia/Jones Reply at 3, note 4.

111 C&P ex parte letter, March 2, 1994.

112 47 C.F.R. § 1.2002.

113 C&P ex parte letter, March 2, 1994.

114 47 U.S.C. §§ 151, 157, 218.

telecommunications infrastructure.[115] The trial process can give carriers the flexibility they need to test their technology and marketing strategies for video dialtone.

55. Under these circumstances, we find that BA has adequately justified its video dialtone market trial proposal.[116] Given the experimental, limited nature of BA's proposal, we find that it is in the public interest to subject the economic support accompanying this trial application to a less exacting level of scrutiny than would apply to an application for permanent commercial, video dialtone service.[117] BA has provided estimated equipment and labor cost information in its application.[118] No petitioners or commenters challenged the cost figures or other economic basis for the proposed trial. BA states that the costs involved in this trial will not be borne by customers of other common carrier services, but will be recovered through the revenues from video dialtone service.[119] All video dialtone incremental investment and related expenses will be assigned to BA's video dialtone service accounts, and will be recovered from revenues for the service, "and will be excluded from the cost of providing other regulated common carrier services," states BA.[120] As in the BA Technical Trial Order, if BA's video dialtone costs are not recovered from BA's future video dialtone services, "these costs must be borne by shareholders rather than the ratepayers of other regulated services."[121]

56. To ensure that video dialtone costs are not borne by ratepayers of other regulated interstate services, we will require BA to segregate all costs incurred in providing trial video dialtone service, including development costs and expenses, in Part

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115 VDT Order at 5836, para. 105.

116 See Century Federal, Inc. v. FCC, 846 F.2d 1479, 1481 (D.C. Cir. 1988) (under circumstances of the case, court held that it was entirely within the Commission's discretion to accept a minimal showing of financial justification for new construction under Section 214).

117 See Puerto Rico Telephone Company, DA 94-1384, released Dec. 5, 1994, at para. 39 (PRTC Trial); SNET Trial, at paras. 37, 39; US West Trial, at 188 n.57; Century Federal, Inc. v. FCC, 846 F.2d 1479, 1481 (D.C. Cir. 1988).

118 Extension Request at Exhibit 3.

119 Id. at 16.

120 Id.

121 BA Technical Trial Order at ¶ 13.

32 subsidiary accounting records and to assign these costs directly to the video dialtone trial. If these costs are not recovered from future video dialtone services, they must be borne by BA shareholders, rather than the ratepayers of other regulated services.[122] We also require BA to establish subsidiary accounting records to capture the investments and expenses that are shared between video dialtone and other services.[123] In addition, accurate copies of summaries of the subsidiary accounting records shall be submitted to the Commission on a quarterly basis.[124]

57. The costs of non-common carrier and enhanced services, as well as video customer premises equipment (CPE) offered during the trial must be accounted for in accordance with Part 32 and Part 64 of the rules.[125] We require that, to the extent the accounting treatment of non-regulated components of the video dialtone trial is not already covered by BA's cost allocation manual (CAM), the carrier must revise its manual to show how it intends to allocate costs of such components between regulated and non-regulated activities for the duration of the trial.[126] Any necessary revisions must be filed within thirty days after release of this Order, and at least sixty days before providing non-regulated services related to video dialtone. At a minimum, in its submission, we require BA to list all accounts affected by its provision of non-regulated services associated with its video dialtone trial, and also describe those services. All temporary CAM revisions related to the trial will be subject to public comment and Commission scrutiny. BA must file permanent revisions if and when it is authorized to offer commercial video dialtone services. We emphasize that our decision here, and the conditions we attach to it, are without prejudice to and in no way constrain any action that the Commission may take in later phases of the video dialtone proceeding or any other applicable rulemaking proceeding.

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122 See, e.g., The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd at 2316, para. 13; New York Tel. Co., 8 FCC Rcd at 4329, para. 23.

123 See VDT Reconsideration Order at 83, para. 173.

124 See Id. Copies of accounting records should be sent to the Chief, Accounting and Audits Division, Common Carrier Bureau. We note that these requirements are wholly consistent with the conditions placed upon other video dialtone trial authorizations. See, e.g., C&P Technical Trial; NYT Trial; US West Trial; SNET Amended Trial Order; Puerto Rico Telephone Company.

125 See 47 C.F.R. Parts 32 and 64.

126 See 47 C.F.R. § 64.903.

58. We find that the potential benefits to the public of a limited trial of this size outweigh any possible risks. In sum, we find that BA's proposed market test of an ADSL architecture advances the Commission's goals of establishing a technologically advanced, cost-effective national telecommunications infrastructure, promoting additional competition in the local video distribution market, and fostering a diversity of video services in order to create additional opportunities for consumer choice.

## IV. MOTION TO DISMISS

### A. Contentions of the Parties

59. On November 21, 1994, NCTA filed a Motion to Dismiss BA's application on the ground that BA's proposal violates the principles of video dialtone by including a BA affiliate as a programmer. NCTA states that (1) the VDT Order and previous video dialtone decisions have clearly stated that carrier-provided programming is not permitted under the video dialtone regime; and (2) that C&P v. U.S. does not alter this prohibition.[127] In its Opposition, BA states that NCTA's motion is untimely, redundant and substantively wrong, and restates the arguments in favor of LEC provision of programming it previously advanced in this proceeding. USTA also filed comments in support of BA's opposition to NCTA's motion, and states that the Commission found in the VDT Reconsideration Order that "existing rules will protect telephone ratepayers from improperly subsidizing video dialtone service."[128]

60. NCTA's reply states that video dialtone platforms with carrier-provided programming cannot live up to the "vision of VDT as a nondiscriminatory offering of capacity to programmers...."[129] Adelphia/Jones and Comcast concur with NCTA in their reply comments.[130]

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127 NCTA Motion to Dismiss at 3.

128 Reply of USTA at 2.

129 Consolidated Reply of NCTA at 14.

130 Reply Comments of Adelphia Communications Corporation, Comcast Cable Communications, Inc. and Jones Intercable, Inc. at 2. The replies of both NCTA and Adelphia/Jones/Comcast are consolidated and address a number of video dialtone applications. Among other things, these filings raise issues about whether the VDT Reconsideration Order changed the standards for reviewing cost data and economic justification statements in video dialtone Section 214 applications. Since

**B. Discussion**

61. NCTA's Motion to Dismiss merely reiterates arguments NCTA previously raised in its Petition to Deny. BA has responded to those arguments, and we address them in previous sections of this Order. Accordingly, we deny NCTA's motion.

## V. ORDERING CLAUSES

62. Accordingly, **IT IS ORDERED** that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the Request of The Chesapeake and Potomac Telephone Company of Virginia (File No. W-P-C-6834) **IS GRANTED** to the extent indicated herein, and the applicant is authorized to expand its video dialtone trial by passing no more than 2,000 homes and businesses in its Northern Virginia Service area for a period of six months from the date the first end-user subscriber takes service under an effective interstate tariff for the market trial. Subject to the terms discussed above, BA may extend the market trial for an additional three months. We instruct BA to inform the Secretary of the Commission and the Chief, Common Carrier Bureau, of the date the first end-user subscriber takes video dialtone service under an effective tariff for the trial.

63. **IT IS FURTHER ORDERED** that the petitions to deny filed by the National Cable Television Association and by Adelphia Communications Corporation and Jones Intercable of Alexandria, Inc., and the request by USA Video Corporation for an inquiry by the Commission, **ARE DENIED** to the extent indicated herein; and that the National Cable Television Association's Motion to Dismiss BA's application **IS DENIED**.

64. **IT IS FURTHER ORDERED** that our video dialtone rules are waived to the extent necessary to permit BA to provide programming over its platform for the duration of the trial consistent with this order.

65. **IT IS FURTHER ORDERED** that grant of the application for the ADSL market trial proposed herein **IS SUBJECT TO** the following **CONDITIONS**, in addition to any conditions established in the text above:

a) That BA inform participants in the expanded trial, including both video programmer-customers and end-user

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NCTA's Motion to Dismiss in this application raised only the issue of C&P program provision over its video dialtone platform, we interpret the consolidated replies to apply to the C&P market trial only insofar as they discuss that issue, and not insofar as the replies address other matters.

subscribers, that BA is conducting a trial of video dialtone services, that the trial is limited to a six month period subject to a possible extension of up to three months, and that BA may or may not offer video dialtone on a commercial basis after the conclusion of the trial.

b) That BA account for all costs associated with the trial, including development costs and expenses, in accordance with Part 32 of the Commission's Rules. BA must also create two sets of subsidiary accounting records: one to capture the revenues (if any), investments, and expenses wholly dedicated to the provision of video dialtone service, and the other to capture any revenues, investments, and expenses that are shared between video dialtone and the provision of other services. BA is also required to file summaries of its subsidiary accounting records for public inspection with the Secretary of the Federal Communications Commission on a quarterly basis. Copies of these summaries must also be served on the Chief, Accounting and Audits Division, Common Carrier Bureau.

c) That BA file any necessary revisions to its Cost Allocation Manual within thirty (30) days after release of this Order, and sixty (60) days before providing non-regulated services related to video dialtone, pursuant to this market trial authorization. BA must also list all accounts affected by its provision of non-regulated services associated with the video dialtone trial, and describe those services.

d) That if there is excess programmer capacity on the BA digital video switch dedicated to this market trial, BA shall make this capacity available to interested program providers, including to its affiliate, BVS, on a nondiscriminatory, first-come, first-served basis. No one programmer may occupy more than fifty (50) percent of the capacity on the switch.

e) That BA inform the Commission of any actual or anticipated shortfall in capacity. BA shall report to the Chief of the Common Carrier Bureau, within thirty days of an anticipated capacity shortfall, or within five days of denying any video programmer access to the platform due to capacity limitations, in whole or in part.

f) That BA provide all video programmers with nondiscriminatory access to technical information concerning the basic video dialtone platform and related equipment.

g) That BVS take video dialtone service pursuant to tariff under the same rates, terms and conditions available to other programmer-customers.

h) That BA comply prospectively with any changes in our rules

or any new rules that result from any applicable rulemakings.

i) That, to the extent that BA provides any marketing, promotional, or sales referral services to its affiliate BVS in connection with this market trial, it must offer such services to all other video information providers participating in the market trial on the same terms and conditions.

j) That, in connection with the market trial, BA is also required to offer transport service, interconnection, and interoperability for unaffiliated video programmers that are equivalent to that provided to its affiliate BVS.

k) That, BA shall provide to the Commission copies of all promotional materials and descriptions of all marketing activities directed at encouraging video information providers to use BA's video dialtone service.

l) That BA submit to the Chief, Common Carrier Bureau, six months after commencement of the expanded trial and within sixty (60) days of the end of the expanded trial, written reports. The first report shall, at a minimum, cover the first four months of the trial. The second report shall cover the remainder of the trial. The report must, among other things:

1) identify the capacity allocated to each video programmer customer and the identity of the programmer-customer;

2) include a statement from each video programmer or other service provider using BA's services stating whether that programmer/service provider believes it has been discriminated against by BA in any manner;

3) include a complete survey of end-users designed to evaluate whether end-users had nondiscriminatory access to each programmer and programming offered over the platforms. The survey also should include an evaluation by end-users of the quality of the video dialtone service offered;

4) describe the video dialtone technology used during the trial. BA must include information on the video switch and other components of the video dialtone system, the operation of video-on-demand, the quality of the video, the methods of accessing the platform, and the digital technology incorporated into the network and its impact on capacity;

5) to the extent known, evaluate the market for video dialtone service, providing penetration rates on a monthly basis, and describing consumer interest in on-demand video services and consumer willingness to pay for video dialtone service;

6) detail the costs, both direct and common, BA has allocated to the trial broken down into subsidiary accounting records; and,

7) include any published commentary of which BA is aware regarding the trial.

66. **IT IS FURTHER ORDERED** that pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), the grant of BA's application to provide video dialtone service is subject from the date of release of this grant to the conditions contained herein, and is also subject to any Commission rules or orders that result from any existing or future proceeding or proceedings that address video dialtone cost allocations, jurisdictional separations, pricing issues, carrier provision of programming, other video dialtone issues, or the applicability of provisions in Titles I, II and/or VI of the Communications Act. Failure of The Chesapeake and Potomac Telephone Company of Virginia to decline the authorization as conditioned within thirty-one (31) days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION** FCC 95-18
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Revisions to Price Cap | ) | |
| Rules for AT&T Corp. | ) | CC Docket No. 93-197 |

## REPORT AND ORDER

**Adopted:** January 12, 1995 **Released:** January 12, 1995

By the Commission:

## I. INTRODUCTION

1. In 1989, the Commission eliminated traditional rate of return regulation for AT&T Corp. ("AT&T") and implemented a system of price cap regulation.[1] The new regulatory regime creates incentives for AT&T to improve its efficiency and introduce innovative services, while reducing AT&T's incentive to shift costs from more to less competitive service offerings. Under this system, prices are capped rather than profits. Thus, the plan gives AT&T the incentive to earn higher profits by operating more efficiently, for example, by reducing its costs. To implement the price cap system, the Commission divided AT&T's services into three classifications called baskets and established a price cap index ("PCI") for each basket.[2] The PCI imposes a price ceiling for the services in that basket. In order for the Commission to determine whether rate levels exceed the PCI, AT&T must compute and file for each basket an actual price index ("API") that represents a weighted average of the actual prices of the services within the

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987), Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195 (1988) (Further Notice), Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) (AT&T Price Cap Order), Erratum, 4 FCC Rcd 3379 (1989).

[2] The three baskets contain, respectively, (1) residential and small business services (Basket 1); (2) "800" number services (Basket 2); and (3) other business services (Basket 3). A number of AT&T services are excluded from price cap regulation. See 47 C.F.R. § 61.42(c) for a list of excluded services. For the most part, the Commission has deregulated the services in Baskets 2 and 3. See note 57, infra.

basket. AT&T may change rates for services within each basket if the weighted average of all prices remain below the cap, or PCI.[3] The baskets are further subdivided into service categories, with bands for each service category. The rates for each service band are established by the service band index (SBI). The SBI limits the range within which AT&T may raise or lower prices for individual rate elements in the category each year and still receive streamlined tariff scrutiny. A presumption of lawfulness attaches to rate changes that are below the PCI and within their service categories' bands.[4]

2. An integral part of the price cap plan is a periodic review to determine whether the plan is functioning as we intended and in accordance with the Communications Act of 1934, as amended ("Act"). Accordingly, the Commission adopted a program that combined ongoing monitoring with a formal review of the price cap plan that would be completed during the fourth year. The review was to consist of a comprehensive examination of the effects of price cap regulation, one that considered all available measures of market and carrier performance, such as actual prices, achieved rate of return, quality of service and technological advances.[5]

3. The Commission undertook the first performance review of AT&T, as scheduled, in 1992.[6] On July 23, 1993, the Commission issued a Report on AT&T's performance under price caps.[7] Based on the record in the AT&T Performance Review, the Commission determined that, while overall the price cap plan for AT&T is achieving the goals it is designed to meet, some adjustments to the plan would enhance its effectiveness. Accordingly, the Commission initiated this proceeding to determine whether the price cap plan should be revised in four specific areas and also sought additional information from AT&T concerning its Equipment Blockage and Failure ("EB&F") Reports. These reports measure call blockages and failures for AT&T's services.[8] Six parties filed comments or replies in this proceeding.[9]

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[3] Further Notice, 3 FCC Rcd at 3440.

[4] AT&T Price Cap Order, 4 FCC Rcd at 3095.

[5] Id. at 3143.

[6] Price Cap Performance Review for AT&T, Notice of Inquiry, CC Docket No. 92-134, 7 FCC Rcd 5322 (1992) (Notice).

[7] Report, CC Docket No. 92-134, 8 FCC Rcd 5165 (1993) (AT&T Performance Review).

[8] Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, Notice of Proposed Rulemaking, 8 FCC Rcd 5205 (1993) (NPRM). See para. 42 infra, for further discussion of the EB&F Reports.

[9] Comments were filed by AT&T, Sprint Communications Company LP (Sprint), Aeronautical Radio, Inc. (ARINC), WilTel, Inc. (WilTel), and the Competitive Telecommunications Association (CompTel). Reply comments were filed by AT&T, WilTel,

4. In the NPRM, the Commission set out the following four issues for comment: (1) whether to remove commercial services from Basket 1;[10] (2) whether to revise the price cap treatment of the 800 directory assistance service remaining in Basket 2 and the analog private line services remaining in Basket 3; (3) whether to remove optional calling plans (OCPs) from Basket 1; and (4) whether to clarify or revise the required monitoring and reports of AT&T's service quality and network reliability, including its EB&F Report.

5. This Order removes commercial services from price cap regulation and initiates streamlined regulation for those services. We do not, however, remove either analog private line services or 800 directory assistance service from price cap regulation at this time. In addition, we defer a decision on OCPs to further proceedings in this docket and a related docket on AT&T's promotions (CC Docket No. 87-313). Finally, we find that AT&T has responded adequately to our questions concerning its EB&F Reports, and conclude that revisions to the procedures used by AT&T to compile the reports do not appear necessary at this time. We will continue to review the semi-annual EB&F Reports to ensure that they provide an accurate measure of AT&T's service quality and network reliability trends and performance.

## II. COMMERCIAL SERVICES

### A. The NPRM

6. The NPRM addressed AT&T's petition for waiver to remove commercial services from price caps. According to AT&T, adopting streamlined regulation for commercial services would complete the process of streamlining competitively-provided outbound commercial services that was begun in the Interexchange Proceeding.[11] Several parties commenting on AT&T's waiver request question the market data upon which AT&T relied to support its position. In the NPRM, the Commission stated that adopting AT&T's request to streamline commercial services

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Sprint, Pacific Bell and Nevada Bell (Pacific Companies), and the staff of the Bureau of Economics of the Federal Trade Commission (FTC). The Bureau of Economics of the FTC also filed a motion for leave to file reply comments out of time. The pleading states that the views contained in the pleading are that of a staff member of the Bureau of Economics and do not represent the views of the full FTC. We will grant the motion and accept the reply comments.

[10] AT&T first raised the issue of whether to remove commercial services from price caps in a petition for waiver filed on September 1, 1992. The Commission decided to ask for comment on the issues raised by that petition in this proceeding. See AT&T Performance Review, 8 FCC Rcd at 5166 n.9.

[11] Competition in the Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990) (NPRM), Report and Order, 6 FCC Rcd 5880, 5908 (1991) (Interexchange Proceeding), recon., 6 FCC Rcd 7569 (1991), further recon., 7 FCC Rcd 2677 (1992), Second Report and Order, 8 FCC Rcd 3668 (1993), recon., 8 FCC Rcd 5046 (1993).

could encourage competition in this market, while continued price cap regulation might inhibit such competition. The Commission noted, however, that AT&T's market data may not justify the relief that AT&T has requested.

7. Accordingly, the Commission raised a number of issues that it intended to consider in determining whether to remove commercial services from price caps. The Commission questioned whether AT&T properly identified commercial services as a class of service distinct from residential services. The Commission also expressed concern that AT&T might offer new and restructured services only to its business customers. The Commission stated that AT&T's proposed classification of commercial services does not make clear whether it would bar resale of services designated as commercial to residential customers. Finally, the Commission asked for comment on how streamlining tariff review on rates for commercial long distance services would affect the rate levels and structure for these services.

B. Comments

8. In its comments in response to the NPRM, AT&T argues that it is appropriate to classify commercial service as a separate class of service and price it accordingly. AT&T notes that Section 201(b) of the Act expressly provides for a separate "commercial" service classification.[12] AT&T also contends that the Commission's Rules provide for a commercial service classification, citing, for example, the fact that Sections 69.104(g) and (h) of the Commission's Rules establish separate end user common line charges for residential and multi-line business subscribers.[13] AT&T defines commercial long distance services as domestic and international "Dial Station calls originated on a line for which the subscriber pays a rate that is described as a business or commercial rate in the applicable local exchange service tariff for switched services."[14]

9. In addition, AT&T states that in July and August 1992, it filed tariff revisions to create separate commercial and residential basic schedules in Basket 1. Those tariffs did not change any rate levels and became effective without opposition in September 1992. The first permanent rate changes differentiating commercial and residential rates were filed in March 1993, and took effect, again without opposition, on July 1, 1993.[15]

10. In response to the Commission's concerns regarding the possible introduction of restrictions on resale, AT&T asserts that it will not restrict the use or resale of commercial long distance service. According to AT&T, a commercial AT&T customer remains free under the

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[12] 47 U.S.C. § 201(b); AT&T Comments at 14.

[13] 47 C.F.R. § 69.104 (g), (h); AT&T Comments at 16.

[14] Id. at 13, citing AT&T Tariff F.C.C. No. 1, Section 6.20.

[15] Id. at 12.

tariff to resell commercial long distance service. AT&T further states that rates for its commercial long distance service will be determined by market forces after commercial services are streamlined and that it cannot speculate on what those charges will be in the future.

11. WilTel, CompTel, and Sprint oppose removing commercial services from price caps. Sprint contends that AT&T's market share has not changed sufficiently to warrant removing commercial services from price caps. WilTel, a small interexchange carrier, is concerned that AT&T will engage in unreasonable pricing practices if its commercial services are moved out of price caps.[16] WilTel asserts that AT&T continues to have a major share of the interexchange market and that competition has not developed in the long distance market. As a result, WilTel contends that AT&T's services should continue to be regulated under price caps to prevent AT&T from engaging in unreasonable pricing practices.[17]

12. CompTel opposes removal of commercial services from price caps for a number of reasons. It claims that AT&T's market share is essentially the same now as it was several years ago when the Commission concluded in the Interexchange Proceeding that AT&T's commercial services should remain in Basket 1.[18] CompTel states that commercial services should not be streamlined because removing regulatory restraints on AT&T's prices would neither be beneficial to consumers nor encourage competition in the long distance market. According to CompTel, AT&T would be able to offset any rate decreases implemented for its competitive commercial services with rate increases for its less competitive residential MTS services.[19]

13. In its reply, AT&T disputes the commenters' claims that the Commission found in the Interexchange Proceeding that the level of competition for Basket 1 services did not warrant streamlined regulation. According to AT&T, in that Order the Commission deferred a decision on whether these services should be streamlined because there were "unresolved issues and insufficient information" about the competitiveness of Basket 1 services.[20] Moreover, AT&T contends, the Commission made no specific findings about commercial services in that proceeding because the classification did not exist at that time. AT&T also asserts that the Commission's analysis of competition in the interexchange market was based on data from 1989. AT&T claims that, contrary to the contentions of the opposing parties, there have been significant changes in the market since that time. AT&T maintains that the market analyses submitted by AT&T in this proceeding demonstrate that its share of the commercial long distance market, as

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[16] WilTel Comments at 3.

[17] Id. at 2-3.

[18] CompTel Comments at 2, citing Interexchange Proceeding, 6 FCC Rcd at 5908.

[19] Id. at 4-5.

[20] AT&T Reply, citing Interexchange Proceeding, 6 FCC Rcd at 5908.

measured by minutes of use, has fallen by 15 percentage points since 1989. AT&T asserts that no party submitted reliable, empirical data in this proceeding to refute this showing. AT&T also states that the record in this proceeding shows that its share of the combined commercial long distance and small business optional calling plan customer base decreased by 24 percentage points, as measured by minutes of use, since 1989.[21] Finally, AT&T asserts that it will not restrict the use or resale of commercial long distance service.[22]

14. WilTel argues in its reply that AT&T should not be permitted to create a commercial class of service because that will enable AT&T to segment the interexchange market between residential and commercial customers. It contends that this market segmentation will allow AT&T to raise prices for its less competitive MTS services while lowering prices for its relatively more competitive commercial services.[23] Sprint contends that AT&T provides no support for its claim that it no longer possesses market power in the provision of commercial services that would warrant streamlining that service.[24]

C. Discussion

1. Introduction

15. The commercial services classification was created by AT&T pursuant to Section 201(b) of the Communications Act, which permits the creation of specific classifications of services, including commercial. Commercial services refers to services used by AT&T's customers who are classified as business or commercial customers by local telephone companies. We find that these services should be removed from price cap regulation.

16. AT&T demonstrates both in its comments and through additional information submitted in the record of this proceeding that there is sufficient evidence to conclude that AT&T's commercial long distance services are subject to substantial competition. As discussed more fully below, our analysis rests on considerations of market share, demand responsiveness and supply responsiveness. As a result of this analysis, we conclude that AT&T lacks the ability to exercise unilateral market power in the provision of these services and that there is sufficient competition among providers to justify moving AT&T's commercial services from price caps to streamlined regulation.

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[21] AT&T Comments at 21.

[22] AT&T Reply at 5-7.

[23] WilTel Reply at 4. The Pacific Companies, in their reply, made general comments opposing any changes to price cap regulation for AT&T until the interexchange market is truly competitive.

[24] Sprint Reply at 1.

2. Market Share and Concentration

17. As evidence of its lack of market power, AT&T claims that its share of the overall minutes of use of commercial long distance services decreased from 54 percent in 1987 to 39 percent in 1991.[25] By 1993, however, AT&T's market share increased somewhat to 44 percent.[26] No party has offered any data to rebut these figures.

18. The slight increase in AT&T's market share does not preclude us from finding that AT&T does not possess market power. In the Interexchange Proceeding, we found that AT&T's 50 percent share of the Basket 3 business services market was "a level that is not incompatible with a highly competitive market" and, hence, does not by itself demonstrate that a firm possesses market power.[27] Here, AT&T's market share is even lower. Moreover, the fluctuation in AT&T's market share indicates the considerable willingness of commercial long distance customers to shift between long-distance service providers. This is further evidence that AT&T lacks unilateral market power. In comparison to AT&T's 44 percent share, MCI Telecommunications Corporation's (MCI) share of this market in 1993 was 21 percent, Sprint's share was 13 percent and all other long distance providers had a combined market share of 20 percent.[28] The size of the competitors relative to AT&T suggests they have capacity to service a significant portion of AT&T's customers, should these customers desire to switch carriers. Our analysis of the carriers' capacity, discussed below, further supports this finding.

19. Market share is only one factor to be considered in determining the level of competition in a given market. Relying solely on AT&T's market share at a given point in time to make this determination would be too static and one dimensional. While we have considered market share data in our determination, it has been considered in conjunction with other important factors, as described below.[29]

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[25] AT&T Reply at 6, citing AT&T Petition for Waiver of Price Cap Regulations for New Commercial Long Distance Service Classification at 14-15.

[26] In the NPRM, the Commission stated that whether or not resellers were included in the computation of market share data would not alter the amount of AT&T's market share. CompTel raises this argument again in its comments in response to the NPRM. CompTel Comments at 3. AT&T states in its comments that resellers are not included in market shares of the carriers whose services are resold. AT&T Comments at 19.

[27] Interexchange Proceeding, 6 FCC Rcd at 5890 (footnote omitted).

[28] Ex parte from E.E. Estey, AT&T, to Secretary, FCC, dated July 22, 1994.

[29] This is consistent with the approach we have followed in prior proceedings. See, e.g., Interexchange Proceeding, 6 FCC Rcd at 5887-90.

3. Demand Responsiveness of AT&T Customers

20. Demand responsiveness is the propensity of AT&T's customers to switch carriers or otherwise change the amount of services they purchase from AT&T in response to relative changes in price and quality. AT&T presents evidence that commercial customers will switch carriers in order to obtain price savings and desired features. According to AT&T, its principal competitors provide a number of services that are comparable to those offered by AT&T. For example, Allnet's Solution I and II, Pacesetter and Pacesetter Plus, Cable and Wireless' Longer Distance and Focus, Focus II and Focus III, MCI's Prism Plus, Preferred and Friends of the Firm and Sprint's The Most for Business and Clarity are all alternative commercial long distance services.[30]

21. Moreover, there are indications that customers are well aware of, and make use of, these alternative suppliers.[31] For example, AT&T submitted a chart showing that between April and July of 1994, 150,000 AT&T commercial customers per month switched either from AT&T to another long distance provider or from another provider to AT&T.[32] If this level of customer churn continued over a year, it would amount to approximately 1.8 million customers switching either to or from AT&T out of a customer base of approximately eight million AT&T commercial long distance customers.[33] This amounts to approximately a 23 percent annual churn in AT&T's total customer base of commercial long distance customers, which is strong support for the argument that AT&T lacks market power over its customers. The evidence of customer churn -- that customers are significantly sensitive to price and quality changes -- is corroborated by the fluctuations in AT&T's market share described above. These factors buttress our conclusions that AT&T cannot exercise unilateral market power in the provision of commercial long distance services and that AT&T's commercial services should be removed from price caps and subjected to streamlined regulation.

4. Supply Responsiveness of AT&T's Competitors

22. Another important factor that we believe is indicative of the level of competition in the interstate long distance market is the apparently high elasticity of supply of AT&T's competitors. Supply elasticity refers to the ability of competitors in a market to meet additional demand. In the long distance market, supply elasticity depends to a large extent on the capacity

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[30] Ex parte from E.E. Estey, AT&T, to Secretary, FCC, dated July 25, 1994.

[31] Id.

[32] Id. See also FTC Bureau of Economics Staff Reply at 17-8, that concurred with the Commission's findings in the Interexchange Proceeding that the commercial long distance market exhibits high demand elasticity and that customers will switch carriers in order to obtain pricing savings and desired features.

[33] Ex parte from James Spurlock, AT&T, to Secretary, FCC, dated December 30, 1994.

of the networks of AT&T's competitors. Even if one company has a high market share, it will be constrained from raising its price if its customers are willing to switch providers and its competitors are willing and able to serve those customers at current price levels.[34] We note that competitors must be willing and able to serve a significant portion of AT&T's commercial long distance traffic in response to a price increase, but by no means all of its traffic, in order to deter a price increase.[35]

23. In the Interexchange Proceeding, we noted the impact that excess capacity has on the interstate telecommunications market because it enables firms with relatively small market shares to be well-positioned to capture large numbers of their competitors' customers if their competitors chose to price above competitive rates.[36] AT&T's competitors appear to have sufficient network capacity to serve a significant portion of AT&T's commercial long distance traffic. Much of the network capacity owned by the long distance carriers is fiber optic technology, which is capable of expansion to serve increasingly larger amounts of traffic at relatively low cost. In 1993, AT&T owned 47 percent of the total fiber miles while serving 60 percent of the minutes of use of the interexchange market. In contrast, all other interexchange carriers owned 53 percent of the total-fiber miles while serving 40 percent of the interexchange market. It therefore appears that AT&T's competitors have a greater supply of unused fiber capacity than AT&T.

24. In addition, it appears that the interexchange carriers' network expansion has kept pace with the growth in the market. Our report on 1993 fiber deployment indicates that all major interexchange carriers have expanded their facilities and appear ready to provide service to additional customers. The total number of fiber-miles owned by all interexchange carriers at the end of 1993 was 2,547.5 million miles.[37] Between 1990 and 1993, AT&T increased its fiber miles from 935,700 to approximately 1.2 million miles, MCI increased its fiber miles from 388,000 to 555,500 and Sprint increased its fiber miles from 453,400 to 467,200.[38]

25. The relative size of potential demand compared to available supply is another important indicator of whether AT&T's competitors have sufficient capacity to serve customers that wish to switch from AT&T to another carrier. In 1993, AT&T had 3.16 billion commercial long distance minutes of use. In the same year, its competitors had approximately 73.8 billion

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[34] Interexchange Proceeding, 6 FCC Rcd at 5888.

[35] Id. The Commission made a similar finding with respect to AT&T's competitors' ability to absorb its Basket 3 business services.

[36] Id.

[37] FCC Report: Fiber Deployment Update-End of Year 1993, Table 2, released May 13, 1994 (FCC Report).

[38] Id.

switched minutes of use. AT&T's commercial long distance minutes, therefore, represented only 4.3 percent of the total switched minutes of use of all other carriers. From these numbers, it is evident that AT&T's commercial long distance traffic represents a small portion of the overall switched traffic and that other carriers could absorb all of AT&T's traffic.[39] We find that the amount of capacity held by the various long distance carriers is so high as to reduce greatly the probability of sustained monopoly pricing by any one participant.

5. Conclusion

26. We find that there are adequate competitive alternatives to AT&T's commercial long distance services to constrain AT&T's exercise of monopoly power for these services. We recognize that there is a potential problem that the largest interexchange carriers might engage in oligopolistic coordination resulting in prices above competitive levels in this market.[40] We believe, however, that several factors will operate to deter such a result. As discussed above, because the networks of the interexchange carriers have significant capacity, the cost of serving additional traffic is very low and, conversely, the cost savings associated with a traffic reduction are also quite low. Thus, these carriers have great incentive to protect their substantial investment in these facilities by keeping their prices low to attract and keep customers. Also, the possibility of oligopolistic coordination to raise prices is limited by the demonstrated willingness and ability of commercial long distance customers to move among various commercial long distance services offered by the numerous interexchange carriers.

27. We believe that moving commercial services into the category of services subject to streamlined regulation should encourage more vigorous competition for these services. As we noted in the Interexchange Proceeding, price cap regulation imposes costs on consumers to the extent it denies AT&T the pricing flexibility it needs to react to market conditions and customer demands.[41] We also find that the Commission's rationale in that proceeding for instituting streamlined regulation for business services in Basket 3 is applicable here. The Commission concluded in that decision that "permitting business service tariffs to go into effect on fourteen days notice will result in a substantially more dynamic and proactive market without presenting an undue risk of undetected and unremedied anticompetitive action."[42] We also note that permitting AT&T to offer these services under streamlined regulation will enable AT&T to enter into contracts with customers for these services. We found in the Interexchange Proceeding that "[o]ne important benefit of contract carriage is that it will increase the ability of customers to

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[39] FCC Report at Chart 2.

[40] In an oligopolistic market, there are so few participants that the action of any one of them will materially affect price and have a significant impact upon competitors.

[41] Interexchange Proceeding, 6 FCC Rcd at 5895.

[42] Interexchange Proceeding, 6 FCC Rcd at 5895 (footnote omitted).

negotiate service arrangements that best address their particular needs."[43] By increasing the number of pricing options, contract carriage also reduces the likelihood of oligopolistic coordination.

28. In addition, protection to ratepayers is afforded by the fact that tariffs for commercial long distance service remain subject to Title II of the Communications Act. If the Commission finds that any tariff filing by the interexchange carriers conflicts with the Act or the Commission's Rules, the filing can be rejected on that basis or suspended and investigated pursuant to Section 204 of the Communications Act.[44]

29. Accordingly, we will remove commercial long distance services from Basket 1 effective thirty days after publication of this Order in the Federal Register. We also will require AT&T to remove revenues associated with commercial long distance services from the revenue base used to calculate the various price cap indexes (API and SBIs) in Basket 1 from that date forward.

30. Under our rules, removal of services and their associated revenues from Basket 1, by itself, does not cause any of the various indexes to change.[45] This is because AT&T is only required to update the PCI as either part of the annual price cap filing or to reflect the effect of midyear access and exogenous cost changes. Also, AT&T is only required to update the API and relevant SBIs in connection with price cap tariff filings proposing rate changes. This Order does not require any such rate changes to be made. When AT&T files a rate change after the effective date of this Order, however, the rate change will affect the indexes differently than would have been the case if AT&T's commercial long distance services had not been removed from Basket 1. This is because the API and SBI formulas require that the price indexes be calculated, in part, by multiplying filed rate changes by their base period revenue weights. With the removal of commercial long distance services as required by this Order, the base period revenue weights of services remaining in Basket 1 will change.[46]

31. While we conclude that commercial services should be removed from price caps, we will not permit AT&T to place restrictions on the use and resale of commercial services. The

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[43] Id. at 5899.

[44] 47 U.S.C. § 204. See Interexchange Proceeding, 6 FCC Rcd at 5894 & n.121 (presumption of lawfulness under streamlining does not change the substantive standard to be used in evaluating a tariff in a complaint proceeding or tariff investigation).

[45] See Sections 61.46 and 61.47 of the Commission Rules, 47 C.F.R. §§ 61.46 and 61.47 for a description of the formulas used for calculating the API and SBI, respectively.

[46] See Section 61.46 (a) of the Commission Rules, 47 C.F.R. § 61.46 (a) for a description of revenue weights.

Commission has a long-standing policy of prohibiting restrictions on resale of services.[47] If we see evidence of such restrictions, we will take rigorous enforcement action.[48]

## III. PRODUCTIVITY OFFSET

32. When it adopted price cap regulation for AT&T, the Commission included in the price cap formula a productivity offset, which measures the amount by which overall inflation for the economy has exceeded changes in AT&T's rates, to ensure that carrier productivity results in lower prices for telecommunications services.[49] The Commission found that productivity in the telephone industry has on average exceeded that of the overall economy by 2.5 percent per year. Nevertheless, because the Commission intended that ratepayers should benefit from the adoption of price caps and should share in the additional efficiency gains produced by carriers as a result of the new regulatory regime, the Commission decided that the productivity offset should be set at a level that exceeded the industry's historical productivity offset level. Accordingly, the Commission added a 0.5 percent "Consumer Productivity Dividend" to the historical productivity offset level to ensure that AT&T customers benefited from productivity gains expected under price cap regulation.

33. In the AT&T Performance Review, the Commission declined to revise the 3 percent productivity offset that applies, after adjustments for inflation and exogenous costs,[50] to each of AT&T's price cap baskets.[51] AT&T now seeks to reopen this issue.[52] It maintains that the productivity offset is no longer needed to protect consumers against excessive earnings from

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[47] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), modified on recon., 62 FCC 2d 588 (1977), aff'd, AT&T v. FCC, 572 F.2d 17 (2d Cir.), cert. den., 439 U.S. 875 (1978). We recognize that there are a number of pending complaints that raise allegations that AT&T is placing restrictions on the resale of its commercial services. We will address those allegations within the context of the complaint proceedings.

[48] The Commission recently exercised its enforcement authority by issuing a Notice of Apparent Liability for Forfeiture and Order to Show Cause against AT&T for its failure to provide communications service under Contract Tariff 383. AT&T Communications, Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359, released January 4, 1995.

[49] AT&T Price Cap Order, 4 FCC Rcd at 2989.

[50] Exogenous costs are costs that change due to changes in laws, regulations, rules, or other administrative, legislative, or judicial decisions beyond a carrier's control and are not reflected by the inflation adjustment. Id. at 3002.

[51] AT&T Performance Review, 8 FCC Rcd at 5168.

[52] AT&T Comments at 7-10.

AT&T's Basket 1 services because prices have remained low for the first three years of price cap regulation.[53] AT&T also asserts that there is no reason to believe that the productivity factor, which is currently used for all of AT&T's interstate services, is the correct measure of productivity for the basic schedule switched residential services that will remain in Basket 1 if commercial services are removed. AT&T reasons that the Commission has two options: either compute a new productivity factor based on the revised composition of Basket 1 or eliminate the productivity factor. AT&T supports the elimination of the productivity factor.[54]

34. AT&T has not substantiated its contentions that the Basket 1 productivity factor must be recomputed or eliminated if commercial services are removed from the basket.[55] Removing commercial services from the basket gives AT&T greater flexibility in setting rates for those services, while reducing its regulatory costs. If anything, those changes should enable AT&T to increase its productivity for what to date have been Basket 1 services. AT&T also asserts that it incurs different, often higher costs to provide commercial services. We believe that removal of these costs from the basket should make it easier for AT&T to meet the productivity factor for the services that remain.[56]

35. AT&T has not submitted any information to demonstrate that the productivity factor that has been consistently applied to all Basket 1 services should be modified as a result of our removing commercial services from Basket 1. It has not provided, for example, cost data (other than the generally higher costs it claims for commercial services), or other information that demonstrate that it cannot continue to match or exceed the 3 percent productivity gains in providing basic schedule services. AT&T, of course, has sole access to the information that would support such a finding. On the present record, we find no substantial evidence that would justify modification or elimination of the 3 percent productivity factor for the services remaining in Basket 1. Should the Commission make other major changes to the composition of Basket 1, we will consider whether modification of the productivity factor is warranted at that time.

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[53] Id. at 9 & n.20.

[54] Id. at 8-10.

[55] Id.

[56] Id. at 16 n.33.

## IV. ANALOG PRIVATE LINE AND 800 DIRECTORY ASSISTANCE SERVICES

### A. The NPRM

36. Basket 2 now contains only 800 directory assistance service, while Basket 3 contains only analog private line service.[57] The Commission sought comment on whether regulation of those baskets should be changed. In particular, the Commission sought comment on whether 800 directory assistance and analog private line services should be removed from price cap regulation. These services generate relatively low revenues when compared to AT&T's total interstate operations or the services originally included in Baskets 2 and 3. Therefore, the Commission noted that application of the usual price cap index calculations to these baskets may not be in the public interest. For example, the Commission suggested that the 3 percent productivity factor, which is used for all price cap calculations, may not be appropriate for a basket that contains only one service.[58]

### B. Comments

37. AT&T argues that the Commission should no longer apply the price cap productivity factor to the remaining services in Baskets 2 and 3. According to AT&T, the price cap productivity factor, based on historic, total interstate productivity improvements, has no logical relationship to the productivity improvements that can be expected for the Basket 2 and 3 services.[59] AT&T states that the analog private line services remaining in Basket 3 are being replaced by digital services. AT&T further contends that the 800 directory assistance service is unlike any of the communications services on which we based the productivity factor because it provides information, not transport of communications between end users. AT&T opposes the Commission's alternative proposal to combine Baskets 2 and 3 into a single basket. AT&T sees no benefit in continued price cap regulation of these services either in separate baskets or in one basket.[60]

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[57] Basket 2 originally contained all 800 services. Basket 3 was established for large business customers and contained the following services: Pro America I, II, and III; WATS; Megacom; SDN; other switched; voice grade private line and lines of a lower quality not suitable for voice and data transmission; and other private line services, such as analog private line offerings, which include analog voice grade private line and terrestrial television transmission services. AT&T Price Cap Order, 4 FCC Rcd at 3064. In 1991, the Commission streamlined all of AT&T's Basket 2 services except 800 Directory Assistance and all of its Basket 3 services except for analog private line services. Interexchange Proceeding, 6 FCC Rcd at 5893-95, 5905.

[58] NPRM, 8 FCC Rcd at 5208.

[59] AT&T Comments at 24.

[60] Id. at 25.

38. ARINC, an association representing airline carriers that make extensive use of analog private line services, opposes the removal of these services from price cap regulation. ARINC contends that after the Commission removed all but analog services from Basket 3,[61] AT&T raised the rates for analog services dramatically. ARINC contends that consumers need the protection afforded by price cap regulation to prevent AT&T from increasing rates for analog private line services and to prevent cross-subsidization. ARINC recommends that the Commission place each rate element in AT&T's analog private line tariff in a separate service category and permit AT&T to raise or lower prices for each element no more than 5 percent per year to prevent further price increases by AT&T.[62] No party filed comments concerning 800 directory assistance service.

C. Discussion

39. We decline to make any changes in Baskets 2 and 3. In the Interexchange Proceeding, we stated that we would not make any changes to 800 services in Basket 2 until 800 number portability became generally available.[63] 800 numbers became portable on May 1, 1993 with the implementation of a "data base" system of 800 access[64] and shortly thereafter the Commission removed 800 services from Basket 2, with the exception of 800 directory assistance. The Commission stated that because 800 number portability would not enable competing providers to offer 800 directory assistance, AT&T would continue to be the sole provider of this service. Accordingly, the Commission retained 800 directory assistance in Basket 2, but removed service bands and recalibrated the PCI and API for Basket 2 to reflect the elimination of all services other than 800 directory assistance from the basket.[65] 800 directory assistance remains a monopoly service and therefore it is necessary to regulate the price for this service to protect consumers. The current system of price cap regulation has been shown to be an effective method

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[61] See Interexchange Proceeding, 6 FCC Rcd. at 5895-96.

[62] ARINC Comments at 3-4. ARINC filed a petition for reconsideration and clarification of the portion of the Report and Order in the Interexchange Proceeding that dealt with regulation of analog private line services under price caps. This Report and Order addresses the issues raised by ARINC in its petition and, accordingly, its petition is moot. The reconsideration orders in the Interexchange Proceeding, cited in note 11, supra, do not address the issue of regulation of analog private line services.

[63] Interexchange Proceeding, 6 FCC Rcd at 5906 & n.233.

[64] Provision of Access for 800 Service, Report and Order, 4 FCC Rcd 2824 (1989), recon., 6 FCC Rcd 5421 (1991), Second Report and Order, 8 FCC Rcd 907 (1993), further recon., 8 FCC Rcd 1038 (1993).

[65] See Interexchange Proceeding, Second Report and Order, 8 FCC Rcd at 3671, for a discussion of the adjustments made to the price cap rules for Basket 2 services because 800 directory assistance is the only service remaining in that basket.

for maintaining rates at reasonable levels. As noted in paragraph 1, supra, this regulatory regime caps AT&T's prices instead of its profits. We conclude that the rates for 800 directory assistance should continue to be subject to this regulatory scheme in order to protect captive customers of that service against unreasonable prices. We also find that the lack of competition for these two services lowers the costs associated with price cap regulation and further supports our decision to keep them in price caps at this time.

40. The record in this proceeding indicates that analog private line service offerings will continue to disappear. As we noted in the Report and Orders issued in both the Interexchange Proceeding[66] and the AT&T Performance Review,[67] analog private line customers are migrating to digital and virtual private line services. The Commission declined in the Interexchange Proceeding to remove analog private line services from price caps because:

> elimination of the price cap restraints for analog private line service could lead to higher prices for these services. While many customers would likely respond to higher prices by switching to digital service, adequate substitutes using digital technology are not currently available to all users of analog private line services.[68]

The Commission concluded that the market for these services was not as competitive as the markets for other services offered by AT&T, and therefore required continued oversight under price caps. None of the parties has presented any evidence that the situation has changed since the Commission's 1991 decision in the Interexchange Proceeding.

41. In addition, we deny AT&T's request that we no longer apply the productivity factor to the analog private line services in Basket 3 or to the 800 directory assistance services in Basket 2. In the Interexchange Proceeding, we declined to eliminate the productivity factor when we removed all services except analog private line services from Basket 3. We found that the small demand for these services did not justify the administrative expense of establishing a new productivity factor. In addition, we concluded that "we have no reason to believe that AT&T will not be able to meet the productivity goal embedded in the PCI."[69] AT&T has presented no new evidence in this proceeding that would require us to modify our prior conclusions. Nor has it provided any data to support adopting an alternative productivity factor. Therefore, there is no reason to revise our current regulatory protections for customers or remove them from Basket 3 at this time. Furthermore, AT&T has provided no evidence that the current productivity factor results in unreasonable 800 directory assistance rates. Therefore, 800

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[66] Interexchange Proceeding, 6 FCC Rcd at 5893.

[67] AT&T Performance Review, 8 FCC Rcd at 5170.

[68] Interexchange Proceeding, 6 FCC Rcd at 5895.

[69] Id. at 5896 n.133.

directory assistance services will remain in Basket 2 until directory services are available from other suppliers, or AT&T proposes a more effective regulatory approach.

## V. MONITORING OF SERVICE QUALITY AND NETWORK RELIABILITY

### A. The NPRM

42. In the NPRM, the Commission addressed a number of issues relating to its monitoring of AT&T's service quality that have arisen since the NOI was issued in the AT&T Performance Review in 1992.[70] The Commission expressed concern that price cap regulation might create undesirable incentives for AT&T to permit the quality of its service offerings to deteriorate. As a result of this concern, the Commission required AT&T to file semi-annual EB&F Reports that track its performance in relation to an index that measures the frequency of call blocking. Call blocking occurs when calls are not completed due to equipment failures. The index for the EB&F Reports was set initially at 100, which established the baseline for comparison with any future deviations in service quality. The base period to be used for future comparisons was defined to be the first six months of 1989, which was the six-month period that immediately preceded the effective date of AT&T's initial price caps tariff. The EB&F Reports documented the blocking rate for successive six-month periods. The EB&F index is related positively to the blocking rate. That is, if the index exceeds 100, it means that a higher percentage of calls were blocked during the reporting period than were blocked during the base period. For example, a ten-point increase in the index would mean that 10 percent more calls were blocked during the reporting period than during the base period. The figures are reported separately for blockage associated with AT&T's network and blockage caused by all factors, including blockage attributable to the facilities of local exchange companies terminating AT&T long distance calls.[71]

43. In 1992, AT&T made certain corrections to the 1989 base period, the blockage data that provided the reference point for all subsequent index calculations. It informed the Commission of this change by letter in January 1993.[72] AT&T concluded that these corrections were necessary to compensate for a computer programming error it had discovered in the pre-price cap baseline data used to set the index. AT&T found that improperly programmed switches had caused a number of the calls to be erroneously classified as EB&F calls when they should

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[70] NOI, 7 FCC Rcd at 5323.

[71] Id. at 5325.

[72] Letter from P.J. Aduskevicz, AT&T, to Chief, Industry Analysis Division, FCC, dated January 26, 1993.

have been classified as completed calls.[73] Because of this programming error, AT&T contends, data for the first three months of the pre-price cap period were incorrect and could not be reconstructed. No accurate data had been collected and there was no means to recalculate how many of the calls made during that time were completed. Therefore, AT&T recomputed the index using data from the last three months of the pre-price cap period, which AT&T asserts are correct. AT&T's EB&F scores improved under the revised index.[74]

44. In 1992, AT&T also informed the Commission that starting with its report for the first six months of 1993, it began to use a new method of computing EB&F. Before the Commission required the public submission of EB&F rates, AT&T had included calls to Canada and the Caribbean within its domestic calling measurements for its own internal purposes. In January 1993, AT&T began to exclude calls to and from Canada and the Caribbean, except for the U.S. Virgin Islands and Puerto Rico, from its internal calculations in order to evaluate domestic call characteristics more accurately. AT&T stated that these changes make comparisons with earlier reporting periods impossible. As a result of this change, AT&T has adjusted its domestic EB&F monitoring system to exclude calls to Canada and parts of the Caribbean to reflect the actual domestic calling patterns. AT&T contends that these changes will not interfere with the Commission's ability to identify trends in the level of AT&T's service quality and network reliability.[75]

45. In the NPRM, the Commission stated that these changes to AT&T's EB&F Reports raised concerns about the effectiveness of the reports as a tool for monitoring AT&T's service quality and network reliability under price caps, the very reason for requiring the reports. As a result, the Commission ordered AT&T to commission and submit an independent audit of all EB&F data. The audit report and the audited EB&F data series were to be submitted as part of AT&T's initial comments in this proceeding. The Commission also requested comment on whether its service quality and network reliability monitoring requirements for AT&T should be revised or clarified.[76]

B. Comments and Discussion

46. AT&T filed the information requested in the NPRM relating to its service quality and network reliability. This information includes an independent audit prepared by the accounting firm of Coopers & Lybrand. AT&T also furnished additional information concerning

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[73] AT&T Comments, Exhibit A at 4. Additional information regarding the computer errors was provided by AT&T. Ex parte from Agnes Cashman, AT&T, to Secretary, FCC, dated August 4, 1994.

[74] NPRM, 8 FCC Rcd at 5207.

[75] AT&T Comments at 27.

[76] NPRM, 8 FCC Rcd at 5207-08.

its EB&F reports in a series of ex parte filings. None of the other parties to the proceeding commented on this issue.

47. Based on the AT&T audit report and its ex parte filings, it appears that AT&T had made errors in its baseline EB&F Report and that the corrections undertaken by AT&T were reasonable. We find that AT&T's revisions to the EB&F data are acceptable and will not impair the purpose of the EB&F Reports, which is to provide a reliable measure of AT&T service quality and network reliability performance that is consistent over time. Statistical analysis of the changes in the EB&F Report's coverage arising from the elimination of calls to or from Canada and parts of the Caribbean, indicate that the change will have a de minimis effect on the number of equipment failures and blockages reported[77] because of the statistically insignificant number of calls to those areas in relation to the number of domestic calls completed by AT&T.[78] Based on the record developed in this proceeding, we conclude that the EB&F Reports, as revised by AT&T, provide a reliable and valuable tool for monitoring AT&T's service quality.

## VI. CONCLUSION AND ORDERING CLAUSES

48. For the foregoing reasons, we conclude that it is in the public interest to remove commercial services from price cap regulation and to streamline regulation of these services. In addition, we expect that this decision will foster lower prices and expanded service offerings for customers of commercial services. Accordingly, we order these services removed from Basket 1 and adopt conforming changes to Sections 61.42(a)(1), (b)(1)(vi) and (2)(c), 47 C.F.R. §§ 61.42(a)(1) and (2)(c), as indicated in Appendix A, infra. AT&T is ordered to remove commercial services, as defined in this Order, from Basket 1 in a single filing effective no later than 30 days after publication of this Order in the Federal Register. As indicated above, we are not changing the productivity factor in the price cap formula. We also conclude that there is no basis for changing the current rules and policies governing both 800 directory assistance and analog private line services under price cap regulation. Finally, AT&T has responded to our concerns, as set out in the NPRM, regarding the accuracy of its EB&F Reports. We will, as indicated above, continue to review future EB&F Reports.

49. Accordingly, IT IS ORDERED that the petition to file reply comments out of time filed by the Federal Trade Commission IS GRANTED.

50. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 201-205, 303(r), and 403 of the Communications Act, 47 U.S.C. §§ 151(i), 201-205, 303(r), and 403, Section 61.42 of the Commission's Rules is amended as follows: references to small business services in the

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[77] Ex partes from Charles L. Ward, AT&T, to the Secretary, FCC, dated June 14 & 24, 1994.

[78] Ex parte from Charles L. Ward, AT&T, to Secretary, FCC, dated June 24, 1994.

list of services included in Basket 1 shall be deleted and commercial services shall be added to the list of services AT&T shall exclude from its price cap baskets (See Appendix A).

51. IT IS FURTHER ORDERED that this Report and Order and the rule amendment adopted in this Order shall be effective 30 days after the publication of this rule change in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 61 - TARIFFS

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply Sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. In Section 61.42, paragraphs (a) (1) and (b) (1) are amended by removing the words "and small business" and paragraph (c) is amended by redesignating paragraph (c) (17) as paragraph (c) (18) and adding a new paragraph (c) (17) to read as follows:

Section 61.42 Price cap baskets and service categories.

* * * * *

(c) * * *

(17) Commercial services.

* * * * *

FCC 94-325

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Transport Rate Structure and Pricing | ) | CC Docket No. 91-213 |
| | ) | |

# THIRD MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

Adopted: December 15, 1994 Released: December 22, 1994

Comment Date: February 1, 1995
Reply Comment Date: February 16, 1995

By the Commission:

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## I. INTRODUCTION

**1.** Our transport rate structure and pricing policies are designed to encourage more efficient usage and deployment of telecommunications networks. These policies are also intended to facilitate full and fair competition in the provision of long-distance service, and to create conditions conducive to competition in the provision of local access service. Greater efficiency in deploying telecommunications networks should lead to reduced access charges and make it possible for long-distance companies to lower their long-distance rates. These measures, in turn, should benefit consumers, make resources available for productive investment elsewhere in the economy, and stimulate economic growth. Competition in the long-distance market has already produced a greater range of service options for customers, more rapid deployment of innovative technologies, and lower rates. Greater competition in the local access market should yield similar benefits. Such competition is likely to create greater opportunities for new service providers, and more importantly, for consumers.

**2.** We continue to believe that these objectives are advanced by the interim transport rate structure and pricing rules we have adopted in this proceeding. These rules govern the transport component of interstate switched access service provided by local telephone

companies.[1] Accordingly, in this Order, we affirm the interim transport rate structure, the method we used to establish initial transport rates, and the price cap rules we adopted to regulate future changes in transport rates. We also clarify certain implementation procedures. In doing so, we resolve all the remaining issues raised on reconsideration in this proceeding. We do not address the long-term transport rate structure and pricing rules due to take effect after October 1995, which are the subject of a pending Notice of Proposed Rulemaking.[2] Finally, in the supplemental notice of proposed rulemaking included herein, we seek comment on the implementation of "split billing" of certain local exchange carrier (LEC) facilities that are shared by multiple access customers.

**3.** Twenty-one parties, including most of the major LECs and interexchange carriers (IXCs), requested reconsideration or clarification of almost every issue in the *First Transport Order*. We addressed issues raised by those requests that required guidance before the filing of initial restructured transport rates in the *First Reconsideration Order* and the *Second Reconsideration Order*. Several issues, however, remained unresolved. We decided certain price cap matters in the *Second Transport Order*, based on the record compiled in response to the further notice included in the *First Transport Order*.[3] SW Bell and Sprint sought reconsideration of the *First Reconsideration Order*, and CompTel, WilTel, and Sprint have requested reconsideration of the *Second Transport Order*.[4] For the reasons stated below, we deny the three sets of petitions, except to the limited extent indicated herein.

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[1] "Transport" and "interstate switched access" are defined in paragraph 5, *infra*.

[2] *Transport Rate Structure and Pricing*, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7053-68, ¶¶ 103-45 (1992) (*First Transport Order*), *recon.*, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (1993) (*First Reconsideration Order*), *further recon.*, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 6233 (1993) (*Second Reconsideration Order*)( collectively, *Transport Orders*).

[3] *Transport Rate Structure and Pricing*, Second Report and Order, 9 FCC Rcd 615 (1994) (*Second Transport Order*).

[4] Appendix A, *infra*, includes a complete list of the parties filing petitions for reconsideration, comments, and replies, as well as a list of the abbreviations used in this order to refer to the parties.

## II. BACKGROUND

### A. Overview

**4.** In this background section, we first define "transport" and explain how LECs provide transport services. Next, we discuss the earlier transport rate structure rules, and explain the interim transport rate structure adopted in this proceeding. We address the pricing rules governing the initial rate levels for restructured LEC transport services when the rate structure change was implemented, and we elaborate on the rules governing subsequent changes in rate levels. Finally, we discuss the impact of the transport rate structure and pricing changes on various classes of IXCs.

### B. LEC Provision of Transport Service

**5.** Interstate switched access is a service that LECs provide to enable IXCs and other customers to originate and terminate interstate telecommunications traffic. "Transport" is the component of interstate switched access consisting of transmission between the access customer's point of presence (POP) and LEC end offices. At the end offices, local switching occurs and the traffic is routed to and from residential and business end-users' premises. To place transport services in perspective with the other LEC interstate access services, transport revenues, based on projected Bell Operating Company (BOC) revenues under the interim rate structure, comprise roughly 19% of all BOC interstate access revenues. Under our expanded interconnection policies, competitive access providers (CAPs) and the IXCs themselves may compete with the LECs to provide all or portions of transport service. Figure 1 below illustrates the LECs' switched transport networks.

**6.** LECs provide some transport services using "dedicated" circuits -- circuits that are dedicated to the use of a particular IXC. Dedicated circuits come in varying degrees of capacity: (1) voice-grade circuits, with sufficient bandwidth to carry a single voice conversation;[5] (2) DS1 circuits, with 24 times the capacity of a voice-grade circuit; or (3) DS3 circuits, with 28 times the capacity of a DS1 circuit.[6] Other transport services are provided using a combination of dedicated circuits and circuits that are "shared" or "common" -- that is, the access traffic of several IXCs, as well as other types of traffic in the LEC network, pass over the shared circuits. "Entrance facilities" are dedicated circuits that connect an access customer's POP with the LEC central office serving that POP. The LEC central office serving a particular POP is referred to as a serving wire center (SWC). Except when traffic is coming from, or going to, end users served directly by the SWC central office, IXCs must have their traffic carried between the SWC and other LEC offices. This traffic between LEC offices is

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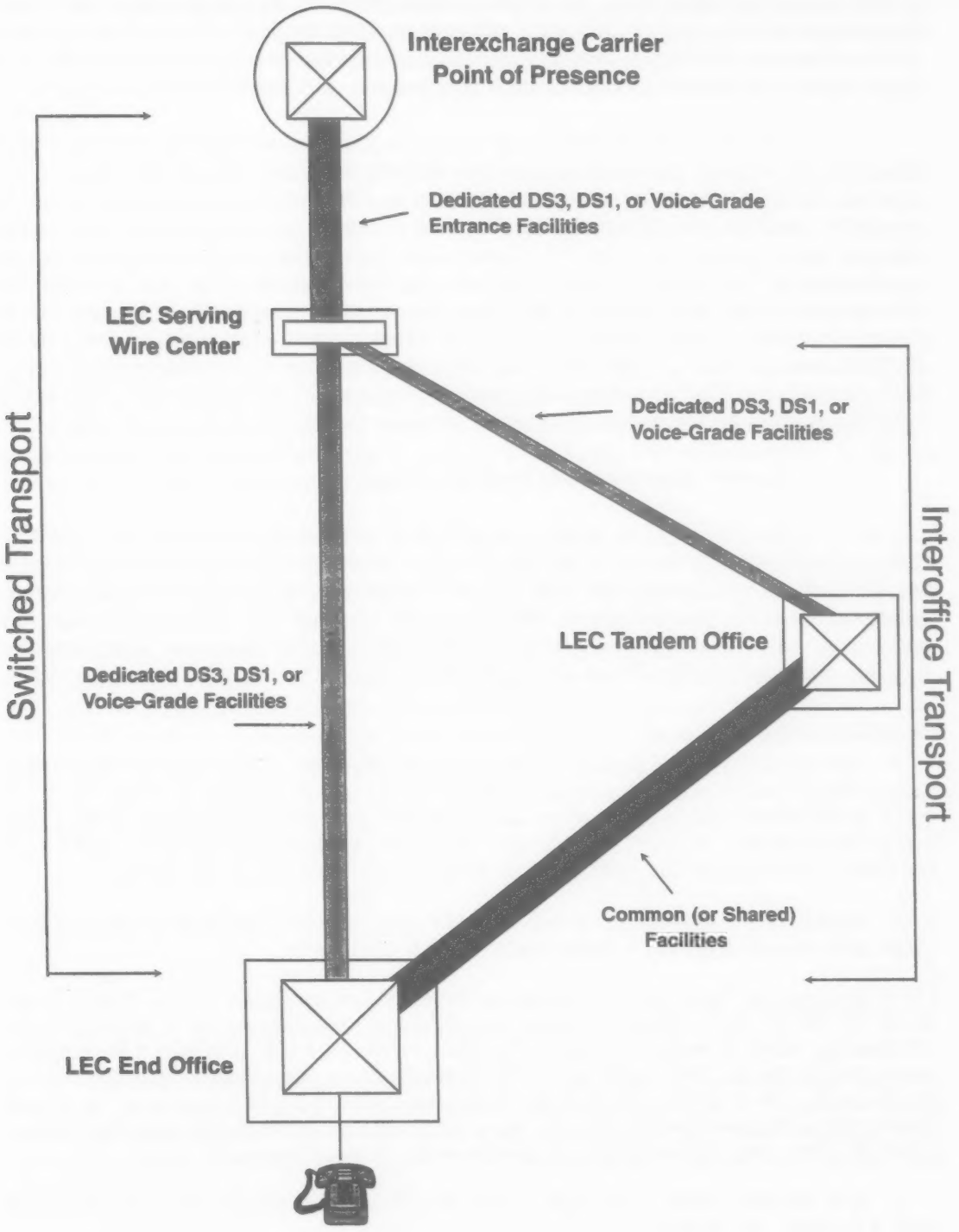
[5] DS0 circuits have a capacity similar to that of voice-grade circuits. The terms "DS0" and "voice-grade" are often used interchangeably.

[6] Circuits that can transmit bits of data more rapidly have a greater transmission capacity; thus, the term "speed" is frequently used synonymously with capacity in this context.

FIGURE 1: LEC SWITCHED TRANSPORT NETWORK


Interexchange Carrier Point of Presence
Dedicated DS3, DS1, or Voice-Grade Entrance Facilities
LEC Serving Wire Center
Dedicated DS3, DS1, or Voice-Grade Facilities
Switched Transport
Interoffice Transport
LEC Tandem Office
Dedicated DS3, DS1, or Voice-Grade Facilities
Common (or Shared) Facilities
LEC End Office

referred to as "interoffice transport." In some cases, IXCs use dedicated interoffice trunks from a SWC directly to end offices. In addition, IXCs that use LEC access tandem switches -- intermediate switches used to concentrate and route transport traffic -- may purchase dedicated circuits between a SWC and a tandem office. Tandem-switched traffic, which is switched at an access tandem, is carried between tandem offices and end offices over shared circuits.

**7.** In our 1983 *Access Charge Order*, we adopted rules requiring LECs to allocate transport costs between dedicated transport and common transport.[7] The *Access Charge Order* required the LECs to charge for dedicated transport on a flat-rated, per-line basis to reflect its non-traffic sensitive cost characteristics. Common transport was to be charged on a usage-sensitive basis. Subsequently, the U.S. District Court for the District of Columbia entered the Modification of Final Judgment (MFJ) implementing the divestiture of the Bell System. The MFJ included a requirement known as the "equal charge" rule, stating that from January 1, 1984 through September 1, 1991, the BOCs were required to charge an equal amount per minute for all IXCs' transport traffic.[8] We waived the rules adopted in the *Access Charge Order* for all LECs to enable the BOCs to comply with the equal charge rule.[9] Upon expiration of the MFJ's equal charge rule, we initiated this proceeding to revisit the structure of transport rates.

### C. Interim Transport Rate Structure Rules

**8.** Three goals guided our efforts to reform the transport rate structure: (1) encouraging efficient use of transport facilities by allowing pricing that reflects the way costs are incurred; (2) facilitating full and fair interexchange competition; and (3) avoiding interference with the development of interstate access competition.[10] The equal charge rule required the LECs to charge usage-sensitive rates even to access customers using dedicated facilities, the costs of which are not affected by the amount of traffic carried over them. Thus,

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[7] *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241, 309, ¶ 230 (1983) (*Access Charge Order*), *modified on recon.*, 97 F.C.C.2d 682 (1983), *modified on further recon.*, 97 F.C.C.2d 834 (1984), *aff'd in principal part and remanded in part, National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *modified on further recon.*, 99 F.C.C.2d 708 (1984), 101 F.C.C.2d 1222 (1985), *aff'd on further recon.*, 102 F.C.C.2d 849 (1985).

[8] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 233, Appendix B, ¶ B(3) (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[9] *See American Tel. & Tel. Co., Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations*, 94 F.C.C.2d 545, 547, ¶ 4 (1983)(setting waiver to expire on December 31, 1984), *recon.*, 97 F.C.C.2d at 862, ¶ 88 (extending waiver through May 31, 1985); *MTS and WATS Market Structure*, Memorandum Opinion and Order, CC Docket No. 78-72, Phase I, FCC 85-87, 50 Fed. Reg. 9633, ¶ 7 (1985) (extending waiver until further notice); *Transport Rate Structure and Pricing*, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991)(retaining equal charge rule pending further Commission action).

[10] *First Transport Order*, 7 FCC Rcd at 7009, ¶ 5; *First Reconsideration Order*, 8 FCC Rcd at 5372, ¶ 2 (1993). *See supra* ¶ 1.

the charges paid by these customers did not reflect the manner in which LECs incurred transport costs. The equal charge rule also interfered with the development of efficient competition for interstate access service, because LECs were forced to charge per-minute rates for services that their competitors (*e.g.*, competitive access providers (CAPs)) would be able to price on a flat-rated basis. Thus, we decided that continuing the equal charge rule was no longer in the public interest.[11]

**9.** In the September 1992 *First Transport Order*, we decided that an interim transport rate structure was the best way to achieve our public interest goals in the near term. This rate structure, illustrated in Figure 2 below, includes flat-rated elements for: (1) entrance facilities; and (2) direct-trunked transport, the service carrying traffic over dedicated interoffice facilities not used with tandem switching. The interim rate structure also includes usage-sensitive charges for: (1) tandem-switched transport, the service carrying traffic that is switched at an access tandem switch between the SWC (or tandem office) and end offices; and (2) the interconnection charge, created consistent with existing price cap rules for rate restructures, to enable the LECs initially to receive approximately the same revenues under the interim rate structure as they would have received under the old equal charge rate structure. In other words, the interconnection charge was designed so that, initially, the rate restructure *per se* did not change the amount of revenues obtained by the LECs from their transport services.[12]

**10.** Although the LECs always provide tandem-switched transport using the same basic network configuration (see Figure 1 above), under the interim rate structure, they must make tandem-switched transport available in two pricing options (both illustrated in Figure 2 below). First, an IXC may purchase tandem-switched transport with the mileage component measured directly between the SWC and the end office, regardless of the actual physical routing (Pricing Option 1 in Figure 2). Second, an IXC may purchase a dedicated facility between the SWC and the tandem office and then tandem-switched transport between the tandem office and the end office, with the mileage component measured between the tandem office and the end office (Pricing Option 2 in Figure 2).[13]

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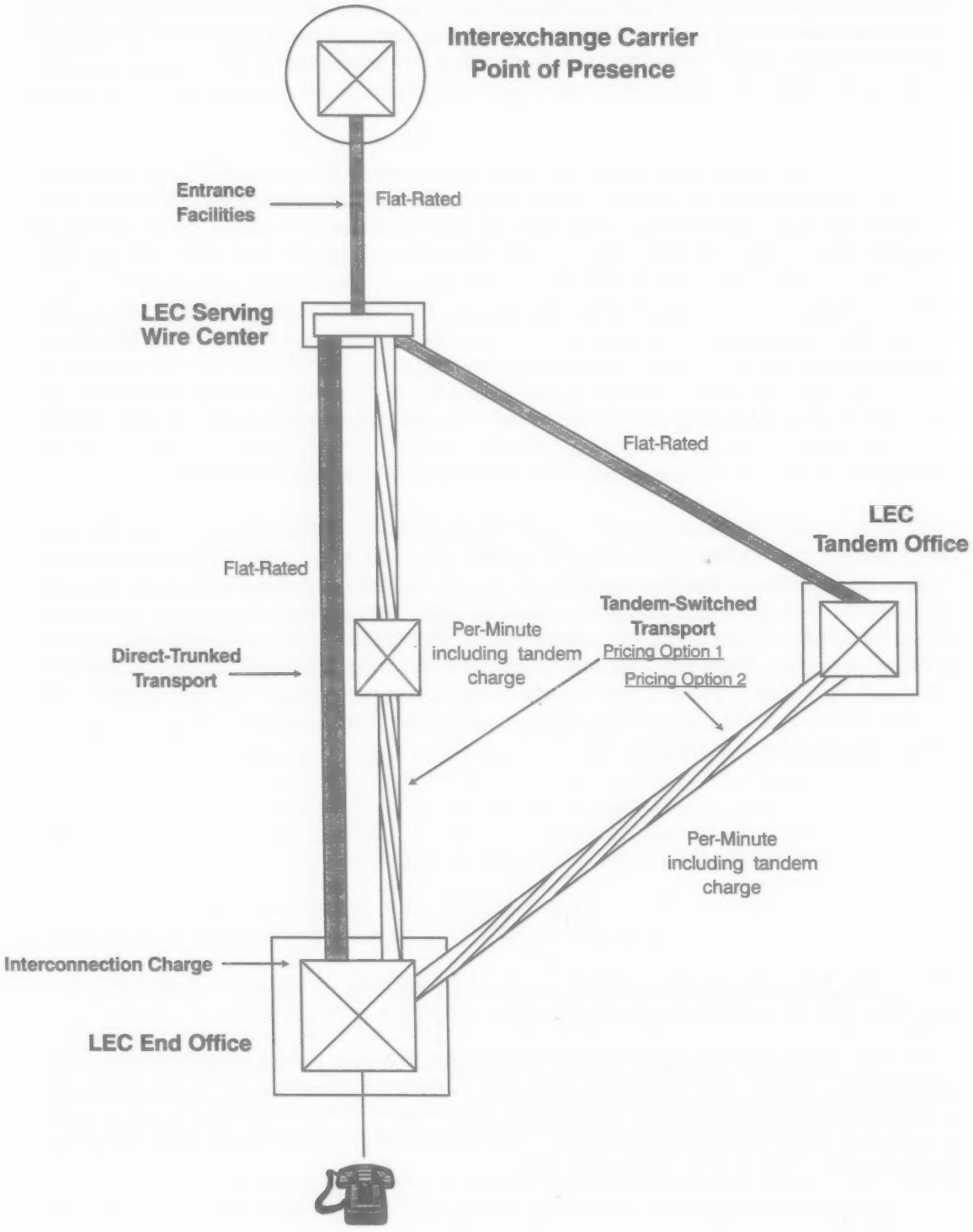
[11] *Transport Rate Structure and Pricing*, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341, 5344, ¶ 13 (1992); *First Transport Order*, 7 FCC Rcd at 7016, ¶ 20.

[12] The Commission originally directed the LECs to calculate the interconnection charge by subtracting the revenues from facilities-based transport elements (projecting the total amount of demand of facilities-based transport elements under the new rate structure) from the revenues the LECs would have received under the equal charge regime. *First Transport Order*, 7 FCC Rcd at 7038, ¶ 61; *First Reconsideration Order*, 8 FCC Rcd at 5378, n.68.

[13] *First Reconsideration Order*, 8 FCC Rcd at 5372, ¶ 9.

## FIGURE 2: INTERIM TRANSPORT RATE STRUCTURE



**11.** In the 1992 *First Transport Order*, we concluded that the interim rate structure should remain in effect through October 31, 1995.[14] We also issued a further notice seeking comment on the appropriate long-term transport rate structure and pricing once the interim rate structure expires.[15] In the 1993 *First Reconsideration Order*, we exempted smaller LECs (LECs not considered "Tier 1 LECs") from implementing the interim rate structure, but retained the requirement that all LECs providing entrance facilities do so on a flat-rated basis. We also required non-Tier 1 LECs to offer flat-rated direct-trunked transport upon receipt of a *bona fide* request.[16]

### D. Initial Rate Levels for Restructured Transport Services

**12.** In the *First Transport Order*, we concluded that the special access rate structure and the associated pricing provide a rational framework for establishing initial transport rates.[17] (Special access services are LEC interstate access services, such as private line, that do not use local switching.) First, the LECs offer special access and transport services using similar -- and in some cases, the same -- network facilities. For example, LECs provide switched transport entrance facilities using the same circuits that they use to provide special access facilities between IXC POPs and LEC SWCs. Second, before the price cap system was implemented in 1991, LEC special access rate levels had been cost-supported by the LECs under the Commission's rate-of-return rules and subjected to the tariff review process. In adopting LEC price caps, we specifically concluded that special access rate levels were a reasonable basis from which to launch a system of price cap regulation.[18] Special access rate changes between 1991 and the transport restructure complied with the requirements of the LEC price cap rules. Thus, in the *First Transport Order*, we determined that the initial rates for the new switched

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[14] *First Transport Order*, 7 FCC Rcd at 7010-11, ¶ 9.

[15] *Id.* at 7053-68, ¶¶ 103-145.

[16] *First Reconsideration Order*, 8 FCC Rcd at 5380-81, ¶ 60. Tier 1 LECs are LECs having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time. *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364, 1364 (Com. Car. Bur. 1990) (defining Tier 1 LECs using the criteria used to define Class A companies in 47 C.F.R. §§ 32.11(a), (e)); *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7372 n.1 (1992)(*Special Access Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *vacated in part and remanded sub nom. Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), *further recon.*, 8 FCC Rcd 7341 (1993).

[17] *First Transport Order*, 7 FCC Rcd at 7028, ¶ 42.

[18] *Policy and Rules Governing Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6814-16, ¶¶ 230-44 (1990)(*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991), *further recon.*, 7 FCC Rcd 5235 (1992).

transport rate elements, for the most part, should be presumed reasonable if they were based on the LECs' existing rates for comparable special access services. For example, the rates for DS1 transport entrance facilities were to be based on the pre-existing rates for DS1 special access circuits between POPs and SWCs. Consistent with price cap regulation, we required that the rate restructure be revenue neutral to the LECs, and therefore did not require the LECs to provide detailed cost support for their initial transport rates.

**13.** Instead, we imposed a limited benchmark requirement on the setting of the initial transport rates to protect against possible adverse effects on smaller IXCs. To establish the appropriate benchmark, we compared the LECs' rates for existing DS3 special access services with their rates for existing DS1 special access services. We found that most LECs' rates for such DS3 services, which have 28 times the capacity of DS1 services, were at least 9.6 times their rates for DS1 special access services. Thus, we imposed a 9.6-to-1 benchmark requirement to ensure that those LECs with special access DS3-to-DS1 rate ratios that fell below most other LECs' rate ratios either provided cost justification for basing their initial restructured transport rates on their special access rates, or filed transport rates that complied with the benchmark ratio and certain other requirements.

**14.** In the July 1993 *First Reconsideration Order*, we addressed the application of the interim rate structure to network configurations not considered in the *First Transport Order*. We also addressed the method by which the LECs were to establish initial transport rates, including the interconnection charge, and resolved certain implementation issues. Specifically, we modified the calculation of the interconnection charge to require the LECs to use historical facility demand and configurations, rather than projected demand after IXCs reconfigure their networks in response to the restructure. We did this because of the LECs' incentive to under-estimate the projected demand for transport facilities and thereby inflate the interconnection charge, and because there was no method for the Commission or other parties to measure the accuracy of the LEC projections. We stressed, however, that the initial interconnection charge was to be calculated on a residual basis to further the goal of a revenue-neutral rate restructure. We did not intend that the LECs lose substantial amounts of revenue during the first year of the interim rate structure as a result of transport reconfigurations. Therefore, to achieve an interconnection charge that was neither too high nor too low, we stated that we would permit a mid-course adjustment to the interconnection charge.[19] In the 1993 *Second Reconsideration Order*, we adopted a technical correction to our rules that required price cap LECs to base their initial calculation of the interconnection charge on historical usage demand, instead of projected usage demand.[20] To date, no LEC has requested a mid-course adjustment.

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[19] *First Reconsideration Order*, 8 FCC Rcd at 5378, ¶ 46.

[20] *Second Reconsideration Order*, 8 FCC Rcd at 6233, ¶¶ 3-6.

**15.** On September 1, 1993, the LECs filed tariffs offering transport services pursuant to the interim rate structure and pricing rules. These tariffs became effective on December 30, 1993.[21]

### E. Price Cap Safeguards

**16.** In the *First Transport Order*, we concluded that, after the initial rates were set under the interim rules, subsequent changes to the transport rates of price cap LECs would be governed by our price cap rules, just as most other LEC access offerings are regulated. Our LEC price cap rules create incentives for efficient operation and give price cap LECs a limited degree of pricing flexibility to adjust their rates according to market conditions, while at the same time guarding against anti-competitive pricing behavior.[22]

**17.** Under LEC price cap regulation, we have broadly grouped LEC services into baskets, each of which is subject to an aggregate price cap or ceiling. Specific LEC services within each basket are grouped into narrower service categories and subcategories, each of which is subject to upper and lower pricing bands (*i.e.*, somewhat more disaggregated price ceilings and floors). The price cap rules permit LECs to adjust their rates within these limits with minimal Commission review. The price cap for each basket and the pricing bands for each service category and subcategory are adjusted annually based on pre-defined formulas.[23] The LECs may adjust their rates with minimal justification, as long as the aggregate rates for each basket do not exceed the specified cap, and the aggregate rates for each service category and subcategory remain between the upper and lower pricing bands. Substantial cost justification is required if rates exceed the price cap for a basket or fall above or below the applicable pricing bands for a service category or subcategory.[24] The LEC price cap rules limit the potential for anti-competitive pricing by placing services subject to different competitive pressures into different baskets, service categories, and service subcategories, thus limiting the LECs' ability to offset lower prices for one class of services or customers with higher prices for another class of services or customers.

**18.** For purposes of price cap regulation, in the *First Transport Order*, we placed flat-rated transport, tandem-switched transport, and the interconnection charge into separate service categories of the traffic sensitive basket, which at that time contained the local switching charge and the bundled transport rates under the equal charge rule. (The alignment of the price cap baskets and service categories adopted in the *First Transport Order* is illustrated in Figure 3 below.) We set the upper and lower pricing bands at the normal +/-5% for the flat-rated

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[21] *Local Exchange Carrier Switched Local Transport Restructure Tariffs*, Order, 9 FCC Rcd 400 (Com. Car. Bur. 1993)(*Tariff Order*).

[22] *LEC Price Cap Order*, 5 FCC Rcd at 6789-91, ¶¶ 21-37.

[23] 47 C.F.R. §§ 61.45, 61.47.

[24] *LEC Price Cap Order*, 5 FCC Rcd at 6823-24, ¶¶ 300-11.

FIGURE 3: PRICE CAP BASKETS AND SERVICE CATEGORIES AS OF THE *FIRST TRANSPORT ORDER*

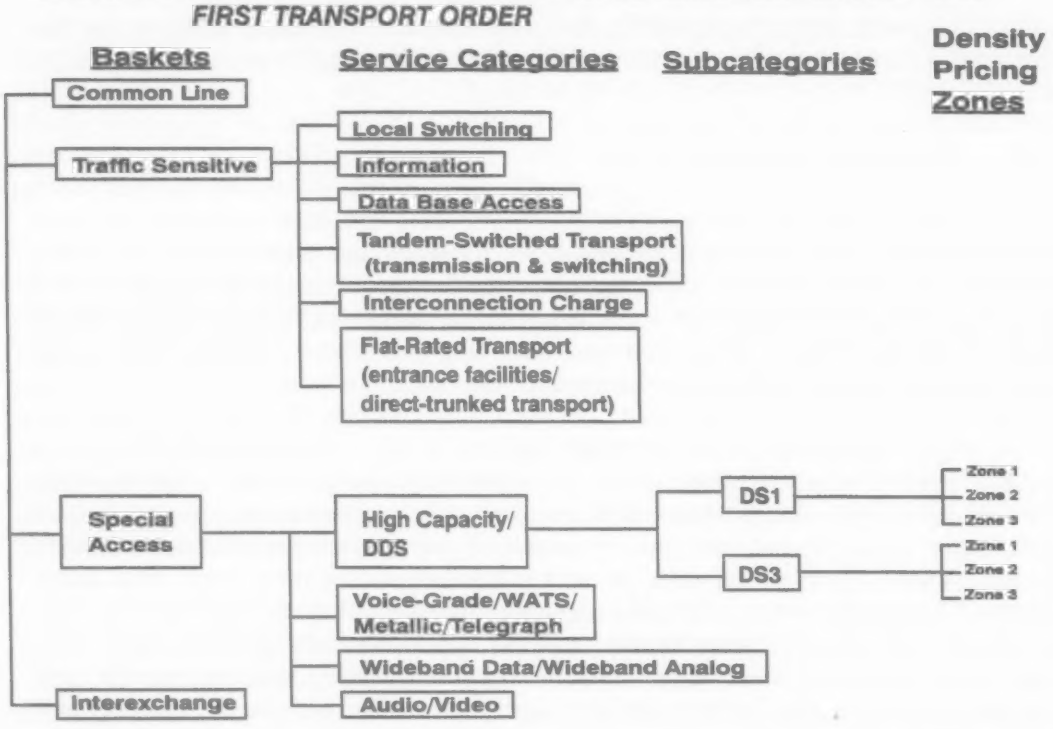
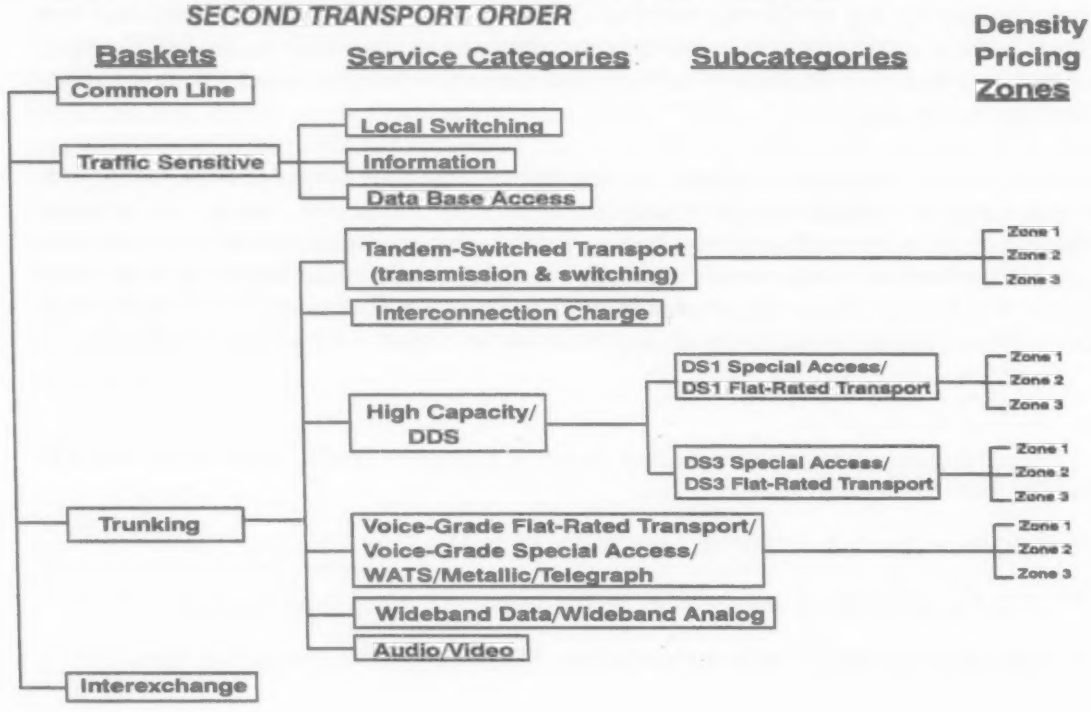



FIGURE 4: PRICE CAP BASKETS AND SERVICE CATEGORIES AS OF THE *SECOND TRANSPORT ORDER*



transport service category. For the tandem-switched transport and the interconnection charge service categories, we adopted special narrower pricing bands. We set the pricing bands at +2% and -5% for the tandem-switched transport service category, and set a +0% price ceiling (with no lower limit) for the interconnection charge service category. These provisions limit the LECs' ability to offset price increases and decreases among these service categories, protect tandem-switched transport customers from significant annual rate increases, and link future changes in the interconnection charge to the LECs' overall price levels.

**19.** In the January 1994 *Second Transport Order*, we modified the price cap baskets and service categories based on the record developed in response to the further notice. Specifically, we moved transport and special access services into a newly created trunking basket.[25] There already had been separate service categories and subcategories for DS3, DS1, and voice-grade special access services. We placed DS3, DS1, and voice-grade flat-rated transport services into the same service categories and service subcategories as comparable special access services. Thus, for example, DS3 special access services and DS3 direct-trunked transport services were placed into a single subcategory. We kept tandem-switched transport and the interconnection charge in separate service categories. (The alignment of the price cap baskets, service categories, and service subcategories adopted in the *Second Transport Order* is illustrated in Figure 4 above.) This price cap structure further limited price cap LECs' ability to offset lower rates for more competitive services with higher rates for less competitive services. For example, this structure prohibits price cap LECs from precipitously raising the rates for DS1 direct-trunked transport, which may be subject to less competition than DS3 services, while reducing the rates for DS3 direct-trunked transport.

**20.** We also made important changes in our rules governing transport in the closely related expanded interconnection proceeding. In that proceeding, we adopted policies to create new opportunities for the competitive provision of access services, including transport, that the LECs traditionally have provided on a monopoly basis.[26] In conjunction with opening the switched transport market to competitive entry, we permitted LECs that are providing switched expanded interconnection to engage in density zone pricing of transport services.[27] Density zone pricing is a system that permits LECs gradually to reduce rates in dense geographic areas that are less costly to serve, and to increase rates, relatively speaking, in less dense areas that are more costly to serve. (Density zone pricing is implemented through special price cap service subcategories for each zone, as illustrated above in Figure 4.) We also allowed LECs

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[25] *Second Transport Order*, 9 FCC Rcd at 623-27, ¶¶ 16-25.

[26] *Special Access Expanded Interconnection Order*; *Expanded Interconnection with Local Telephone Company Facilities*, Transport Phase I, Second Report & Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993)(*Switched Transport Expanded Interconnection Order*), *pet. for review pending sub nom. Bell Atlantic v. FCC*, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993). *See also Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion & Order, 9 FCC Rcd 5154 (1994)(*Expanded Interconnection Remand Order*).

[27] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7425-32, ¶¶ 95-112.

to implement cost-justified volume and term discounts for transport in a state once a certain degree of competitive entry has occurred in that state.[28] We concluded that this would ensure that the LECs' switched transport expanded interconnection offerings provide a viable competitive opportunity before permitting discounted transport offerings.[29]

### F. Impact of the Transport Rate Restructure on Different Categories of IXCs

**21.** In general, we seek to safeguard the public interest and competition, not to shield competitors from fair competition or to minimize the rate changes experienced by particular industry groups. We adopted the new transport rate structure and pricing rules based on the public interest considerations discussed in the 1992 *First Transport Order*. As we noted in that order, we also examined BOC and GTE estimates of the impact of the new rate structure on the total switched access costs of different classes of IXCs, but the specific results reflected by those estimates did not form the basis of our decisions.[30] As a result of the modifications made in the 1993 *First Reconsideration Order*, we required the BOCs and GTE to submit updated impact estimates, initially in September 1993. After staff review uncovered errors in those estimates, the Common Carrier Bureau required the LECs to file corrected estimates in November 1993. To help customers plan for rate changes under the rate restructure, we also required these LECs to provide each of their switched access customers with sample bills indicating what that customer would have paid for transport in a recent month had the interim rate structure been in place.[31] On December 29, 1993, the Common Carrier Bureau directed the BOCs and GTE to provide quarterly monitoring reports during 1994 that contained information to assist the Commission in monitoring the effect of the interim transport restructure on IXCs.[32] After discussions with all interested parties, the Bureau accepted a revised data set and filing format proposed by the LECs.[33] The predicted impacts and the reported actual impact data are set forth in Table 1 below.[34]

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[28] *Id.* at 7432-36, ¶¶ 113-20.

[29] *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5204, ¶ 182.

[30] *First Transport Order*, 7 FCC Rcd at 7040-42, ¶¶ 65-69.

[31] *First Reconsideration Order*, 8 FCC Rcd at 5381, ¶¶ 65-66.

[32] *See, e.g.*, Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donna M. Hermerding, Ameritech Services, dated December 29, 1993.

[33] *See* Memorandum from Joseph Mulieri, Bell Atlantic, on behalf of BOCs/GTE, to Policy and Program Planning Division, Common Carrier Bureau, dated April 13, 1994. *See, e.g.*, Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to William Blase, Jr., Southwestern Bell, dated May 16, 1994.

[34] For further explanation of the LEC estimates and the reported impact data, see Appendix B *infra*.

**Table 1: CHANGES IN INTERSTATE SWITCHED ACCESS RATES PAID BEFORE AND AFTER TRANSPORT RATE RESTRUCTURE[35]**

| | AT&T | MCI AND SPRINT | SMALL IXCs | DIFFERENCE BETWEEN AT&T AND SMALL IXCs (C MINUS A) |
|---|---|---|---|---|
| 1992 PREDICTED IMPACT (EXCLUDING PACIFIC) | A1 -0.6% | B1 +0.9% | C1 +1.8% | D1 2.4 |
| NOVEMBER 1993 PREDICTED IMPACT (EXCLUDING PACIFIC) | A2 -0.9% | B2 -1.3% | C2 +1.8% | D2 2.7 |
| NOVEMBER 1993 PREDICTED IMPACT (INCLUDING PACIFIC) | A3 -0.8% | B3 -1.3% | C3 +2.9% | D3 3.7 |
| FIRST QUARTER 1994 ADJUSTED ACTUAL IMPACTS | A4 +1.2% | B4 +2.3% | C4 +4.8% | D4 3.6 |
| SECOND QUARTER 1994 ADJUSTED ACTUAL IMPACTS | A5 +0.3% | B5 +1.3% | C5 +2.2% | D5 1.9 |
| THIRD QUARTER 1994 ADJUSTED ACTUAL IMPACTS | A6 -1.6% | B6 -1.5% | C6 -0.2% | D6 1.4 |
| FIRST THREE QUARTERS 1994 ADJUSTED ACTUAL IMPACTS | A7 -0.0% | B7 +0.7% | C7 +2.2% | D7 2.2 |

[35] The bottom four rows of Table 1 (cells A4 through D7) set forth the percentage change in the amounts paid by each category of IXC to the eight largest LECs (the BOCs and GTE) for interstate switched access during the first, second, and third quarters of 1994, relative to the corresponding quarter of 1993. This comparison removes any seasonal effects on switched access revenues. The impact figures set forth in the bottom four rows of Table 1 have been adjusted to remove the effects of traffic growth and any independent rate changes between the compared quarters, and were calculated by weighting the switched access revenue impact of each BOC and GTE by the total number of local switching minutes of use for each such LEC per quarter.

**22.** The empirical data filed by the BOCs and GTE indicate that the impact of the rate restructure on small and medium IXCs as groups during the first three quarters of 1994 (the bottom four rows of Table 1) has been minor. Moreover, the actual impact generally has been consistent with the BOC and GTE estimates made before the transport rate structure took effect (top three rows of Table 1). For instance, the BOCs and GTE report that small IXCs paid 2.2% more in switched access rates, as a result of the transport restructure (controlling for traffic growth and for unrelated rate changes), during the first three quarters of 1994 as compared with the first three quarters of 1993 (see cell C7 in Table 1). This compares with 1993 BOC/GTE projections that small IXCs would pay 2.9% more in switched access rates as a result of the restructure (cell C3).[36] Moreover, the difference between the actual impact on small IXCs and the actual impact on AT&T was 2.2 percentage points in the first three quarters of 1994 (cell D7), compared with 3.7 percentage points projected in 1993 (cell D3). Based on these data, it appears that earlier concerns that the interim rate structure would place small IXCs at a significant competitive disadvantage proved to be unfounded.

**23.** Notwithstanding the change in interstate switched access rates paid by the different categories of IXCs, the small IXCs experienced significantly larger traffic growth, measured in minutes of use, than the three largest IXCs during the first three quarters of 1994, according to the empirical data reported by the LECs. The small IXCs experienced traffic growth of 17.9% over the first three quarters of 1994. For the same three quarters, AT&T experienced traffic growth of 3.5%, and MCI and Sprint, collectively, experienced traffic growth of 3.9%. The annual traffic growth experienced by the IXCs, as measured from the third quarter of 1993 to the third quarter of 1994, was 23.2% for the small IXCs, 7.5% for MCI and Sprint, collectively, and 3.2% for AT&T. This significant traffic increase indicates that, following the transport restructure, smaller IXCs as a group continue to be strong and growing competitors in the interexchange market.

**24.** In addition, the reported data, as well as other data collected by the Commission regarding the number of IXCs operating in the United States and each state, indicate that the number of small IXCs doing business nationally did not change significantly.[37] Indeed, the number of small IXCs operating in such relatively rural states as North Dakota, South Dakota, Wyoming, and others appears to have increased somewhat. These data do not indicate that the transport restructure has caused any significant reduction in consumer choices in rural states or elsewhere, nor forced IXCs to abandon markets they traditionally served.

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[36] To put these figures in context, interstate switched access represents roughly 40% of a facilities-based IXC's total costs. Since Table 1 reflects the impact of the interim transport rate structure on IXCs' switched access costs, the impact of the interim transport rate structure on such IXCs' total costs would be slightly less than one-half that reflected in Table 1.

[37] *See* Long Distance Carriers and Their Code Assignments, Report for the Second Quarter 1994, Industry Analysis Division, Common Carrier Bureau, September 1994, at 10; Long Distance Carriers and Their Code Assignments, Report for the Fourth Quarter 1993, Industry Analysis Division, April 1994, at 11.

## III. THIRD MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

### A. The Interim Rate Structure

**25.** Background. The interim transport rate structure was established to align transport rates more closely with the manner in which LECs incur the costs of providing transport services (*i.e.*, either over dedicated facilities or over a combination of dedicated and shared facilities), as described *supra* in paragraph 6 and as illustrated *supra* in Figures 1 and 2. Under the interim rate structure, dedicated facilities, such as entrance facilities and direct-trunked transport, are charged on a flat-rated basis and may be distance sensitive, while tandem-switched transport is charged on a per-minute basis and may be distance sensitive, with the mileage measured from the SWC to the end office. The interconnection charge is charged on a per-minute basis to all interstate access customers.

**26.** Positions of the Parties. Pacific and AT&T argue that the entire interim rate structure is flawed because it is designed to protect smaller suppliers in the interexchange market rather than to serve the Commission's three original goals, and they advocate immediate implementation of a long-term rate structure that fully reflects these three goals.[38] AT&T argues that postponing the adoption of fully cost-based transport rates for another two-year period (after the eight-year period from divestiture through 1991) conflicts with the Commission's findings that the equal charge rule is inefficient and is at odds with promoting access competition through expanded interconnection.[39] AT&T also argues that the interim rate structure precludes competition at the tandem and is inconsistent with the Commission's repeated efforts to unbundle rate structures, because the interim rate structure bundles the charge for routing traffic from the SWC to the tandem switch and from the tandem switch to end offices into one rate element.[40] Pacific contends that the rate structure is costly and unnecessary, given the steady increase in traffic carried by Tier 3 IXCs and CAPs.[41] BellSouth argues that the Commission should discard interexchange competition as a primary goal in this proceeding and address such concerns in other arenas.[42]

**27.** In comments filed before the adoption of our 1993 *Switched Transport Expanded Interconnection Order*, several LECs assert that the interim rate structure fails to account for the advent of expanded interconnection for switched transport, and they argue that a long-term rate structure, removing constraints on the LECs' ability to compete, should be

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[38] Pacific First Order Petition at 1-4, 7, 16-17; AT&T First Order Petition at 2-9; AT&T First Order Reply at 2-4. *See also* USTA First Order Petition at 3.

[39] AT&T First Order Petition at 2-9; AT&T First Order Reply at 2-4.

[40] AT&T First Order Petition at 6 & nn.6, 8 (citing *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

[41] Pacific First Order Petition at 9-11.

[42] BellSouth First Order Reply at 6.

made effective concurrent with switched expanded interconnection.[43] SW Bell, U S West, and AT&T assert that the new rate structure is inconsistent with switched transport expanded interconnection and tandem switching competition because it bundles the provision of the dedicated link between the SWC and the tandem switch with the provision of tandem switching and the common transport link between the tandem switch and the end office.[44]

**28.** In support of the interim rate structure, Rochester argues that to adopt a permanent transport rate structure immediately is inappropriate because the Commission needs additional information on the issues and because it would substantially harm interexchange competition.[45] CompTel, WilTel, and Sprint defend the rate structure as: (1) consistent with the traditional LEC practice of offering end-to-end services, rather than piece-part facilities, to customers; (2) properly reflective of how LECs design their interoffice networks and the lack of customer control over tandem deployment; (3) avoiding imposing uneconomic, extra fixed charges on users of tandem-switched transport; and (4) conducive to local access competition.[46] MCI supports the adoption of an interim plan pending resolution of the complex issues related to a long-term plan.[47]

**29.** Sprint argues that the Commission should hold open the record of this proceeding to make changes to the interim rate structure in the event the filed interim rates have rate impacts substantially different from those discussed in the *First Transport Order*.[48] BellSouth and USTA oppose Sprint's position, arguing that such an approach might create an extended proceeding that would endlessly consume valuable resources when such effort might be better spent towards adopting a long-term framework.[49] The Ad Hoc Telecommunications Users Committee (Ad Hoc) and Allnet argue for focusing attention on the long-term plan, rather than altering the interim plan.[50]

**30.** Discussion. The interim rate structure is a significant improvement over the "equal charge" rate structure. We believe that the interim rate structure is consistent with all three of our goals in this proceeding. First, the interim rate structure permits LECs to offer

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[43] First Order Petitions of: USTA at 2-7; BellSouth at 6-8; Pacific at 11-12; U S West at 4-7; Cincinnati Bell at 3, 9; BellSouth First Order Reply at 3-5.

[44] First Order Petitions of: U S West at 6-7; SW Bell at 5-6; AT&T at n.6.

[45] Rochester First Order Opposition at 4-6.

[46] First Order Oppositions of: CompTel at 2-3; WilTel at 5-11; Sprint at 3-4.

[47] MCI First Order Opposition at 3-6, 17-18.

[48] Sprint First Order Petition at 19-20; Sprint First Order Reply at 9-10.

[49] USTA First Order Opposition at 17; BellSouth First Order Opposition at 6-7.

[50] First Order Oppositions of: Ad Hoc at 1-3; Allnet at 1-4.

unbundled elements of transport service at rates more reflective of the manner in which costs are incurred in providing those elements. Second, the rate structure is consistent with full and fair interexchange competition because it permits IXCs to serve their customers using more efficient transport services priced under an economically more rational rate structure, and enables them to obtain transport services from sources other than the LECs. Third, the rate structure is consistent with local access competition and expanded interconnection because it enables the LECs to offer flat-rated entrance facilities and direct-trunked transport, like their access competitors using expanded interconnection.

**31.** We have weighed the costs associated with an interim approach -- namely, the effect on tandem competition and the delay in implementing a fully cost-based rate structure -- against the benefits associated with its balancing of our three public interest goals. We conclude that our cautious approach of adopting an interim rate structure and seeking comment on a long-term rate structure was a reasonable step towards a more cost-based transport rate structure. Given the broad scope of the transport restructure, we concluded that a cautious, interim transport rate structure could mitigate possible adverse effects on the pluralistic supply of interexchange service on terms that facilitate full and fair interexchange competition. The interim transport structure allows IXCs time to prepare for a fully cost-based rate structure by reconfiguring their networks and taking other steps to eliminate network inefficiencies developed under the equal charge rule. While we recognize that maintaining the interim structure, and, along with it, the continued availability of bundled tandem-switched transport, might impede the development of tandem competition to some degree, we have adopted other measures to promote such competition.[51]

**32.** We decline to hold open this proceeding, as Sprint suggests. We conclude that we have had sufficient time to evaluate the interim restructure. Moreover, in the notice portion of the *First Transport Order*, we sought comment on permanent transport rate structure issues, and if future events demonstrate that further rate structure adjustments are needed, we can address them in that phase of this proceeding. We conclude, however, that continued monitoring of the effects of the interim transport rate structure would be in the public interest, and we delegate authority to the Chief, Common Carrier Bureau, to continue and refine the Bureau's transport monitoring program. With our affirmation of the interim transport rate structure, we retain our conclusions that: (1) non-Tier 1 LECs are exempt from implementing the interim transport rate structure; (2) if such LECs provide entrance facilities, they must provide them on a flat-rated basis; and (3) such LECs must offer flat-rated direct-trunked transport upon receipt of a *bona fide* request.[52]

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[51] *See Expanded Interconnection with Local Telephone Company Facilities*, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994)(facilitating competition in the provision of tandem switching).

[52] *First Reconsideration Order*, 8 FCC Rcd at 5380-81, ¶ 60.

## B. Initial Benchmark Level and Permanent Rate Relationships

**33.** Background. To facilitate the implementation of the initial transport rates under the new structure, we accorded a presumption of reasonableness to the LECs' initial restructured transport rates if they were based on the rates for comparable special access services in effect on September 1, 1992.[53] This presumption of reasonableness applied only if the ratio between a LEC's special access DS3 and DS1 rates was at or above the benchmark ratio of 9.6 to 1. Thus, the LECs could have set their initial DS3 transport rates greater than or equal to 9.6 times their DS1 rates without providing substantial cost justification. We determined the level of the benchmark by requiring the LECs to calculate the ratio between: (1) the total charge for a one-mile channel termination, ten miles of interoffice transmission, and one DS3 multiplexer using the LEC's DS3 special access rates, and (2) the total charge for a one-mile channel termination plus ten miles of interoffice transmission using the LEC's DS1 special access rates.[54] Most of the LECs' special access DS3/DS1 rate ratios exceeded 9.6 to 1. Thus, we established 9.6 to 1 as a benchmark ratio, and decided that if a LEC's special access DS3/DS1 rate ratio exceeded that benchmark, transport rates based upon the LEC's special access rates would be presumptively lawful.[55]

**34.** We required those LECs whose special access rate ratios fell below the benchmark to make a "substantial cause" showing that their rates were reasonable, or in the alternative, that they file new transport rates that satisfied the 9.6 to 1 benchmark, but that would not increase the proportion of transport revenue recovered through the interconnection charge.[56] To take a hypothetical example, a LEC with a special access DS3/DS1 rate ratio of 8 to 1 might have recovered 65% of its transport revenues through the interconnection charge if its initial transport rates were based on its then-existing special access rates, without regard to our benchmark requirement. If that LEC, however, filed transport rates satisfying the 9.6 to 1 benchmark, it was permitted to recover only 65% of its transport revenues through the interconnection charge. The LECs with special access rates below the benchmark uniformly chose to file new transport rates consistent with the benchmark, rather than file cost justifications. The 9.6 to 1 benchmark was developed only to establish initial transport rates, not to govern the rate relationships between different transport services after the initial rates became effective. Subsequent transport rate changes initiated by price cap LECs have been governed by the price cap rules.[57]

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[53] *First Transport Order*, 7 FCC Rcd at 7010, 7027-34, ¶¶ 8, 40-52.

[54] *Id.* at 7033, ¶ 51. *See also* 47 C.F.R. § 69.108(a).

[55] *First Transport Order*, 7 FCC Rcd at 7034, ¶ 52.

[56] *Id.*

[57] *Id.* at 7043, ¶ 73.

**35.** While there is no special access rate element that directly corresponds to tandem-switched transport, we found that the underlying facilities used to provide tandem-switched transport are essentially the same as special access facilities, except for the tandem switch.[58] Therefore, we permitted the LECs a presumption of reasonableness if they set their initial rates for the transmission portion of tandem-switched transport on the per-minute equivalent of their direct-trunked transport DS1 and DS3 rates: (1) weighted based on the mixture of fiber and copper facilities used by the LEC in providing interoffice services; and (2) calculated using a loading factor of 9000 minutes of use per month per voice-grade circuit.[59] We required that the tandem switching charge, a subelement of the tandem-switched transport rate, recover 20% of the fully allocated costs of the tandem switch.[60]

**36.** In the *Second Transport Order*, we explicitly declined to adopt permanent rate relationships between different transport services -- for example, to require the LECs to maintain a 24 to 1 ratio between their DS3 and DS1 services on a continuing basis. We observed that: (1) fixed rate relationships would discourage the LECs from lowering DS3 and possibly DS1 rates, which would retard long-distance price reductions and ultimately could restrict economic growth; and (2) applying ongoing rate relationship requirements to the LECs and not their competitors could inhibit the full development of access competition.[61] To address concerns raised regarding potentially anti-competitive LEC pricing, we placed DS3, DS1, and voice-grade flat-rated transport services into separate service categories and subcategories, limiting the LECs' ability to offset rate reductions for one service with rate increases for another service. We also retained our placement of tandem-switched transport and the interconnection charge in separate price cap service categories with particularly narrow upper pricing bands -- +2% for tandem-switched transport and +0% for the interconnection charge -- to further restrict the LECs' ability to raise rates for these services.

**37.** Positions of the Parties. Some of the parties ask us to consider: (1) adjusting the benchmark used to establish initial transport rates and applying it to subsequent transport rate changes, (2) applying it separately to different transport segments, and (3) modifying the methodology used to establish initial transport rates by LECs that have special access rates below the benchmark.

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[58] *First Transport Order*, 7 FCC Rcd at 7036, ¶ 55; *First Reconsideration Order*, 8 FCC Rcd at 5376-77, ¶¶ 34-39.

[59] *First Transport Order*, 7 FCC Rcd at 7036-37, ¶ 56; *First Reconsideration Order*, 8 FCC Rcd at 5377, ¶ 42.

[60] *First Transport Order*, 7 FCC Rcd at 7037-38, ¶ 59; *First Reconsideration Order*, at 5378, ¶ 45.

[61] *Second Transport Order*, 9 FCC Rcd at 623, ¶ 15.

**38.** Adjusting the Benchmark or Applying it to Subsequent Rate Changes. CompTel, Sprint, and WilTel argue that the Commission should significantly adjust the benchmark upwards and require LECs to comply with such a benchmark on an ongoing basis.[62] CompTel, Sprint, and WilTel assert that the 9.6 to 1 benchmark is too low because it is based on special access rates that reflect non-cost-based rate differences, and that it unjustly discriminates against smaller volume customers.[63] Further, they argue that price cap regulation is insufficient to protect smaller IXCs from ongoing price discrimination as the LECs subsequently change their transport rates.[64] They argue that the non-cost-based differences between the rates for higher and lower volume transport services award AT&T an unfair advantage over smaller volume IXCs. They also contend that these rate differences provide incentives for all IXCs to purchase excess capacity and under-utilize facilities: they argue that BOC DS3/DS1 ratios create incentives for IXCs to purchase DS3 facilities and use only, on average, 54% of the facility, based on a two mile circuit, or 26%, based on a twenty-five mile circuit.[65] Instead, they argue for rate ratios that would create incentives for IXCs to use 85% of the capacity of a DS3 circuit. Consequently, CompTel, WilTel, and Sprint advocate benchmark ratios somewhere in the range of 20 to 1 and 24 to 1.[66] They base these benchmark ratios on cost assumptions relying primarily on the capacity difference between DS3 and DS1 circuits, taking into account some allowance for multiplexing and fill factors of 85%.[67]

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[62] First Order Petitions of: CompTel at 17-18; WilTel at 19-21; Sprint at 15-16; Second Order Petitions of: CompTel at 12-18; WilTel at 7-13; Sprint at 4, 7-11. CompTel also argues that the Commission should modify the language of its rules so that transport tariffs not complying with the benchmark ratio or rates not based on special access rates on a per-element basis will always be suspended and investigated. CompTel First Order Petition at 11, 14.

[63] CompTel First Order Petition at 5-9; WilTel First Order Petition at 8-9; CompTel First Order Reply at 4, 6-7 (adding that compliance with the price cap rules does not ensure cost-based rates).

[64] Second Order Petitions of: CompTel at 12-14; WilTel at 7-8; Sprint at 7-11.

[65] WilTel Second Order Petition at 15-18; CompTel Second Order Petition at 17; *ex parte* submission of CompTel at 4, filed April 22, 1994.

[66] WilTel First Order Petition at 10; Second Order Petitions of: CompTel at 14-15; Sprint at 3-4. *Accord*, MCI First Order Opposition at 12; WilTel Second Order Petition at 13.

[67] When a LEC leases an entire DS3 circuit to an IXC, the IXC bears the burden of putting that circuit to use. When a LEC leases individual DS1 circuits to an IXC, the LEC bears the burden of putting to use the DS3 facility that carries the individual DS1 circuits. Thus, when an IXC orders DS1 circuits, the cost of the DS3 circuit cannot be spread among all 28 DS1 circuits comprising that DS3 circuit, but only among the DS1 circuits actually used. In addition, LECs often leave a few DS1 circuits on a DS3 facility empty in order to anticipate growing facilities demand and for purposes of emergency backup. As used in this order, the term "fill factor" refers to the difference between the costs associated with utilization of a DS3 circuit when it is leased in its entirety and the costs associated with the same facility when it is leased in portions as DS1 circuits.

**39.** The LECs' initial tandem-switched transport rates were set based on the direct-trunked transport rates using the mix of fiber and copper facilities in the LECs' interoffice networks to weight the DS3 and DS1 direct-trunked transport rates, respectively. WilTel and CompTel argue that this circuit mix, based on updated fiber/copper ratios, should be used annually to adjust a permanent rate relationship for tandem-switched rates.[68] As an alternative to using a revised benchmark to govern transport rates on an ongoing basis, Sprint urges the Commission to set the per-month equivalent of the tandem-switched transport rate as the ceiling for DS1 direct trunks.[69] Sprint asserts that because the Commission requires that the charge for tandem-switched transport be based on the actual DS3 and DS1 circuit mix of a LEC's interoffice network, and because almost all tandem-routed traffic will likely be carried at DS3 speed, it is possible that tandem-switched transport rates could be less than DS1 direct-trunked transport rates. Sprint asserts that this situation is illogical since it is more efficient to route traffic via dedicated DS1 circuits than through a tandem switch. Similarly, Allnet argues that direct-trunked and tandem-switched rates within a density zone should be linked, so that if direct-trunked transport rates are lowered within a zone, tandem-switched transport rates must be lowered by the same percentage.[70]

**40.** To support the claim that price cap regulation is insufficient to prevent discriminatory LEC pricing, CompTel, in *ex parte* submissions, submits data from the 1994 annual access tariff filings indicating that four of the BOCs have reduced their direct-trunked transport rates while not reducing at all, or as much, their tandem-switched transport rates.[71] CompTel asserts that these price trends demonstrate that the LECs are placing higher overhead loadings on their smaller volume services, thus discriminating against their smaller volume customers (assuming that the direct costs of providing DS3, DS1, and tandem-switched transport services have not changed).[72] Sprint supports CompTel's data and notes that, in U S West's 1994 annual access tariff filing, U S West's transport rates fell below a DS3/DS1 ratio of 9.6

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[68] First Order Petitions of: CompTel at 18-19; WilTel at 21.

[69] Sprint First Order Petition at 13-15. *Accord*, CompTel Second Order Petition at 18-19 (arguing use of the 28 to 1 rate relationship to establish (1) a DS1 ceiling based upon the DS3 rate level, and (2) in conjunction with updated copper-fiber data, a tandem-switched transport rate ceiling based on DS3 and DS1 rate levels). Presumably, CompTel recommends that the ceiling for tandem-switched transport rates (exclusive of the tandem charge) would be derived by: (a) multiplying the voice-grade capacity of a DS1 circuit (24) times the average loading of a DS1 circuit (9000 minutes); and (b) multiplying that product by the updated copper-fiber mix (which is intended as a surrogate for the ratio of DS3 to DS1 circuits used by a particular LEC to provide tandem-switched transport services). *Id.*

[70] Comments of Allnet Communication Services, Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141 (filed Dec. 4, 1992) at 6-7. We noted that we would consider Allnet's argument in this proceeding. *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7427, ¶ 101.

[71] *Ex parte* submission of CompTel at 4, filed May 31, 1994.

[72] CompTel Second Order Reply at 3; *ex parte* submission of CompTel at 2-3, filed May 31, 1994.

to 1.[73] Sprint further argues that, under the price cap regime, over a three year period LECs will be able to lower DS3 rates by 27% and raise DS1 rates by 16%, thereby reducing the already low ratio of 9.6 to 1 to 6.04 to 1.[74]

**41.** To further support its argument that LEC transport rates are not cost-based, CompTel cites decisions of two state commissions declining to allow LEC intrastate transport rates that mirrored interstate transport rates to take effect. CompTel also cites statements of other state commission officials arguing that such rates be rejected.[75] In addition, CompTel provides a copy of its application for enforcement of the MFJ against BellSouth, in which CompTel alleges that BellSouth's transport rates violate the MFJ's requirements that access rates be cost-justified and nondiscriminatory.[76] BellSouth opposes CompTel's arguments, and

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[73] Sprint Second Order Reply at 7.

[74] Sprint Second Order Petition at 10. *See also* WilTel Second Order Petition at 12 (predicting that tandem-switched transport users could see the spread between the rates they pay, and the rates charged competitors using flat-rated transport, increase by 7% a year, or 14% over the two years that the interim plan is in effect - and a spread of over 20% in certain zones).

[75] Letter from Genevieve Morelli, Vice-President General Counsel, CompTel, to Kathleen Wallman, Chief, Common Carrier Bureau, dated November 21, 1994 (*attaching* Oral Presentation by Staff Attorney Kellner, Docket No. U-20800, Louisiana Public Service Comm. (Nov. 9, 1994); *Application of Southwestern Bell Telephone Co., Contel of Texas, and GTE Southwest to Restructure Rates and Pricing of the Local Transport and Directory Transport Categories of their Switched Access Service Tariff*, Proposal for Decision, Docket No. 12784, Public Utility Comm. of Texas (October 25, 1994); *ICC v. Illinois Consolidated Telephone Co., et al.*, Testimony of Elizabeth Ann Wisniewski, Telecom. Dept., Public Utilities Div., Illinois Commerce Comm., Docket Nos. 94-0042, 94-0043, 94-0045, and 94-0046 (June 1994); *Request of Southern Bell for Approval of Revisions to its Access Service Tariff to Restructure Switched Access Local Transport*, Order Approving Revisions to Access Service Tariff to Restructure Switched Access Local Transport, Docket No. 93-756-C, Public Service Comm. of South Carolina (June 30, 1994); and *Tariff Filing by South Central Bell Telephone Company to Redesign Switched Access Local Transport Rates*, Order, Docket No. 93-08865, Tenn. Public Service Comm. (November 3, 1994)); Letter from Genevieve Morelli, Vice-President General Counsel, CompTel, to Kathleen Wallman, Chief, Common Carrier Bureau, dated December 6, 1994 (*attaching* Memorandum from Div. of Communications and Div. of Legal Services, Florida Public Service Comm., to Director, Div. of Records and Reporting, re Docket No. 921074-TP, *Petition for Expanded Interconnection for Alternative Access Vendors within Local Exchange Co. Central Offices by Intermedia Communications of Florida, Inc., et al.*, (Nov. 18, 1994).

[76] Application for Enforcement of Appendix B, Section (B)(2), and Section II(B)(3) of the Modification of Final Judgment and Request for Expedited Treatment, *United States v. Western Elec. Co.*, Civil Action No. 82-0192(HHG), filed Sept. 29, 1994 (*inter alia, citing* BellSouth officials' statements that rates are "market based" rather than cost-based, and alleging that the differences between BellSouth's rates for different transport services are out of proportion to the cost differences between the costs of the services).

specifically disputes CompTel's calculations relating to BellSouth's rate relationships as flawed.[77] CompTel also submits an impact analysis apparently based on data from the LEC monitoring reports, and asserts that the difference in the impact of the rate restructure on small IXCs, as compared with AT&T, has been, and likely will continue to be, significant.[78]

**42.** The LECs generally oppose raising the benchmark and using it to establish permanent rate relationships, while some attack the use of any benchmark.[79] The LECs argue that permanent rate relationships would impose inordinate restrictions on the LEC pricing flexibility permitted under price caps, and that in an increasingly competitive environment, the market should be permitted to drive pricing.[80] Further, they argue that LECs will have incentives to maintain economically rational rate relationships.[81] Moreover, the LECs assert that the method advocated by the IXCs other than AT&T for determining a benchmark -- based on the capacity difference between DS3 and DS1 services -- is flawed because it fails to account for important cost characteristics, such as the proportion of fiber and copper deployed, management and systems operations, and average lengths of circuits. The LECs contend that these costs vary among LECs and over time.[82] They also note that some CAPs and IXCs offer DS3 services priced at a multiple of DS1 rates that is at or below the 9.6 to 1 ratio.[83]

**43.** Some LECs argue that a higher benchmark and permanent rate relationships would prevent customers from taking advantage of the increased efficiency and flexibility of

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[77] Letter from W.W. (Whit) Jordan, Executive Director - Federal Regulatory, BellSouth, to William F. Caton, Acting Secretary, dated December 2, 1994 (*attaching* BellSouth Response to Application for Enforcement Filed by the Competitive Telecommunications Association). *See also* Letter from W.W. (Whit) Jordan, Executive Director - Federal Regulatory, BellSouth, to Kathleen Wallman, Chief, Common Carrier Bureau, dated December 7, 1994.

[78] Letter from James M. Smith, President, CompTel, to Reed E. Hundt, Chairman, FCC, dated December 7, 1994, at 6.

[79] Pacific First Order Petition at 6-7 (arguing that the benchmark is unsupported by the record, designed to protect CAPs and smaller IXCs, and inconsistent with the Commission's goals); U S West First Order Petition at 10-12 (arguing that the benchmark is arbitrary given the wide variation in LEC DS3 and DS1 rates).

[80] First Order Oppositions of: Ameritech at 7; NYNEX at 7; USTA at 12-13; Second Order Oppositions of: BellSouth at 7; USTA at 2; Bell Atlantic at 3; SW Bell at 2.

[81] First Order Oppositions of: Rochester at 11; GTE at 20-21; Rochester First Order Reply at 4-5; BellSouth Second Order Opposition at 5; NYNEX Second Order Opposition at 4.

[82] First Order Oppositions of: Pacific at 8-11; GTE at 18-19; Rochester at 6-8, 11; USTA at 12-13; Pacific First Order Reply at 1-3; Rochester First Order Reply at 2; GTE Second Order Opposition at 3 (arguing that CompTel, WilTel, and Sprint ignore the costs related to provisioning each service).

[83] GTE First Order Opposition at 4, 8; First Order Replies of: Bell Atlantic at 4; NYNEX at n.7; U S West at 6-7.

**43.** Some LECs argue that a higher benchmark and permanent rate relationships would prevent customers from taking advantage of the increased efficiency and flexibility of greater bandwidth services that are justified by cost differences.[84] GTE argues that a higher benchmark would injure smaller IXCs in the long-term by driving larger IXCs to their own bypass facilities or to CAP services, leaving the other IXCs to support the LEC networks.[85] NYNEX submits that substantially raising the benchmark would require either lowering DS1 rates, creating a revenue shortfall that would have to be recovered from the interconnection charge (or the "contribution charge" in the special access context), or raising DS3 rates to price LECs out of the market.[86] Several LECs also argue that their special access rates have been scrutinized in the past and have been determined to be reasonable.[87] Finally, Pacific opposes annual recalculation of tandem-switched transport rates based on updated fiber/copper ratios as contrary to price cap principles.[88]

**44.** Pacific opposes Sprint's alternative recommendation to establish a ceiling for direct-trunked transport rates based on tandem-switched transport rates, arguing that it would constitute a disincentive to use the network efficiently and ignores the extent to which special access rates have been scrutinized for reasonableness.[89] SW Bell characterizes Sprint's proposal as another unjustified attempt to price DS1 at 1/28 of the DS3 direct-trunked transport rate and as an arbitrary tying of one rate element to another, contrary to the price cap rules.[90] USTA asserts that such pricing constraints would result in artificial rate relationships that have no relevance to either economic costs or the market.[91] GTE opposes Sprint's proposal, arguing that IXC service choices should be based on well-managed LEC rates and that the Commission need not try to predetermine service choices through complex and overlapping rules.[92]

**45.** AT&T opposes a higher benchmark, arguing that direct-trunked transport and special access are provided over similar facilities and have similar cost characteristics, that

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[84] Bell Atlantic Second Order Opposition at 3. *Accord*, NYNEX First Order Opposition at 5.

[85] GTE First Order Opposition at 7-11.

[86] NYNEX First Order Opposition at 5-6.

[87] First Order Oppositions of: Pacific at 6-8; BellSouth at 7-8; NYNEX at 4-5; SW Bell at 6-7; U S West at 6; USTA at 13-14; GTE at 9; Pacific First Order Reply at 5-6; GTE Second Order Opposition at 4-5.

[88] Pacific First Order Reply at 8.

[89] Pacific First Order Opposition at 14.

[90] SW Bell First Order Opposition at 8.

[91] USTA First Order Opposition at 11.

[92] GTE First Order Opposition at 15-16.

existing special access rates are reasonable, and that there are cost differentials between DS1 and DS3 facilities. AT&T contends that the small and medium IXCs have not shown that their proposals are justified by service cost relationships, and further contends that the proposals would be contrary to policies of price cap regulation.[93] Moreover, AT&T opposes permanent rate relationships, arguing that price cap restrictions are more than adequate and that subsequent linkage or other restrictions on LEC pricing flexibility are unwarranted and would exacerbate the extent to which tandem-switched transport is priced below cost, particularly as those costs change.[94]

**46.** Applying the Benchmark Separately to Different Transport Segments. WilTel, CompTel, and MCI contend that the LEC interoffice network serves all carriers and involves shared costs, while entrance facilities reflect IXC-specific requirements.[95] Accordingly, MCI, in conjunction with arguing that a significantly adjusted benchmark should govern ongoing rate changes, asserts that LECs should be required to satisfy such a benchmark requirement separately for entrance facilities and for direct-trunked transport. WilTel and CompTel contend that the LECs should be required to satisfy that benchmark requirement ratio separately for the separate components of interoffice transport. For example, they advocate applying benchmark ratios separately for the non-distance-sensitive fixed rate elements and for each of the distance sensitive elements.[96] They also contend that entrance facilities should be removed from the calculation of the benchmark ratio. Sprint states that, even if the Commission declines to increase the benchmark ratio substantially, the other IXCs' suggestions regarding separate application of the benchmark should be adopted.[97]

**47.** A number of LECs and AT&T oppose the proposal to apply the benchmark to separate rate elements on the same grounds that they oppose use of a higher benchmark.[98] Ameritech and Rochester contend that requiring LECs to satisfy the benchmark separately for the fixed and interoffice mileage components, or removing entrance facilities from the benchmark analysis, would serve no purpose and would only further distort LEC pricing because transport services consist of all these components and the analysis assumes purchase of end-to-

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[93] AT&T First Order Opposition at 7-13.

[94] *Id.* at 13-16; AT&T Second Order Opposition at 11-18.

[95] First Order Petitions of: WilTel at 7-8; CompTel at 9-11; MCI at 6-9; MCI First Order Reply at 5-6.

[96] First Order Petitions of: WilTel at 10-11, 13; CompTel at 9-11. Under the rate restructure, LECs are required to charge a fixed rate per circuit, regardless of mileage, for direct-trunked transport. LECs in their discretion may impose an additional charge based on the mileage of the direct-trunked transport circuit in question.

[97] Sprint First Order Opposition at 14-15.

[98] First Order Oppositions of: BellSouth at 4; SW Bell at 7; AT&T at 7-13.

end transport from the LECs.[99] While asserting that the Commission should not impose any benchmark requirement on entrance facilities because such a requirement is already overly restrictive and arbitrary, GTE argues that if a benchmark requirement is maintained it should be determined based on the total circuit configuration and not on an element-by-element basis.[100] Pacific opposes separate benchmarks for entrance facilities and different mileage segments, arguing that the small IXCs are simply seeking uneconomic rates to enable them to compete against AT&T.[101]

**48.** Methodology for LECs with Rate Ratios Below the Benchmark. U S West asserts that the Commission's methodology for computing interconnection charges for LECs with special access rate ratios below the benchmark (described *supra* in paragraph 34) is inconsistent with computing the interconnection charge to yield revenue neutrality. U S West argues that a better approach would calculate the interconnection charge based on the new transport rates, without regard for whether the adjusted rates increase the proportion of revenue recovered through the interconnection charge.[102] Rochester argues that use of the 9.6 to 1 ratio could harm LECs whose special access rates fall below the benchmark, for example, by causing flat-rated transport rates to diverge significantly from the costs of service and from the LECs' special access rates.[103]

**49.** WilTel agrees with the LECs that the Commission should permit the LECs to raise their DS3/DS1 ratio voluntarily or reduce dedicated transport rates to bring them more closely in line with costs, without the requirement that the proportion of revenues recovered through the interconnection charge remain unchanged.[104] Nevertheless, contrary to U S West's and Rochester's arguments, WilTel asserts that the LECs' existing special access rate relationships are discriminatory and do not accurately reflect differences in the cost of providing DS3 and DS1 services.[105] Further, WilTel argues that divergence between special access and switched transport rates would be reasonable in order to achieve the higher benchmark WilTel proposes.[106] Sprint also opposes U S West's arguments, asserting that the Commission has often

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[99] First Order Oppositions of: Ameritech at 6-7; Rochester at 9-10.

[100] GTE First Order Opposition at 10-11.

[101] Pacific First Order Opposition at 11-13.

[102] U S West First Order Petition at 12-13 & n.25.

[103] Rochester First Order Petition at 5-14.

[104] WilTel First Order Petition at 15-18.

[105] WilTel First Order Opposition at 13.

[106] *Id.* at 13-15.

used industry averages or the results of the most efficient carrier as a basis for setting or investigating rates.[107]

**50.** Discussion. For the reasons set forth below, we affirm the benchmark used in setting the initial transport rates and our use of price cap rules, rather than permanent rate relationships, to govern subsequent changes in the price cap LECs' transport rates.

**51.** Adjusting the Benchmark or Applying It to Subsequent Rate Changes. We decline to revise the benchmark used to establish initial transport rates or establish rigid rate relationships based on such a benchmark. We conclude that the small and medium IXCs' suggested level of the benchmark lacks adequate cost justification. Further, fixed rate relationships are not consistent with LEC price cap regulation.[108] To raise the benchmark to the levels suggested by CompTel, WilTel, and Sprint (in the range of 20-to-1 to 24-to-1) would not properly and completely account for several relevant cost factors, explained below.

**52.** Providing DS1 circuits over a DS3 fiber facility imposes costs that are not incurred when a customer leases a full DS3 facility. First, in order to carry DS1 level traffic over a DS3 facility in the interoffice network, the DS1 circuit must be multiplexed up to a DS3 at the SWC so that the traffic can be carried at DS3 speed, and back down to a DS1 at the end office. Due to these additional multiplexing costs, the non-distance-sensitive element of the DS1 interoffice rate should be relatively higher than that component of the DS3 rates. Second, if DS1 direct-trunked traffic is routed through an intermediate office where some of the traffic being carried on the DS3 circuit is dropped off or routed over a different outgoing facility, LECs have to multiplex the circuits down to the DS1 level in order to remove that traffic from the circuit, and then up again to the DS3 level to carry the remaining traffic through the interoffice network. To accomplish this multiplexing, the LEC must convert an optical signal to an electrical signal and then back to an optical signal by using the appropriate optical line terminating circuit equipment. These multiplexing and optical circuit equipment costs would be expected to make the mileage component of DS1 interoffice rates somewhat higher, proportionally, than that of DS3 rates. Third, DS1 circuits composing a DS3 facility generally will not fill the DS3 facility completely. For several reasons (*i.e.*, LEC anticipation of demand growth, LEC decisions to maintain backup circuits, and the random likelihood that access customers do not order DS1 facilities in multiples of 28), there often will be fewer than 28 DS1s in use on each DS3 facility. IXCs that purchase a DS3 facility bear the burden of utilizing the full capacity of the DS3. On the other hand, when an IXC leases DS1 circuits from a particular

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[107] Sprint First Order Opposition at 14 (citing *Annual 1985 Access Tariff Filings*, CC Docket No. 86-125, Phase I, Order Designating Issues For Investigation (released April 14, 1983); *ITT World Communications Inc.*, 85 F.C.C.2d 561, 567 (1981); *Western Union Telegraph Co.*, 25 F.C.C. 535, 580-81 (1958); *Charges for Communications Service*, 12 F.C.C. 29, 62 (1947)).

[108] We dismiss as moot CompTel's request that we make mandatory the setting of the initial transport rates based on individual special access rate elements and on the DS3/DS1 benchmark ratio. All the LEC tariffs implementing the interim rate structure complied with these guidelines, mooting any need to make them mandatory.

LEC, the burden of completely using the DS3 facility on which those DS1 circuits are carried is borne by the LEC, and the LEC can only spread the cost of the DS3 facility among those DS1s that are purchased.[109] Fourth, some of the costs of providing DS3 services are not 28 times the costs of providing DS1 services because, for example, the costs of engineering the network to accommodate DS1s on a DS3 facility, administrative and customer relations costs, and the cost of billing and collecting for the different services, are not necessarily proportionally higher for DS3 services.

**53.** For all of these reasons, we reject the small and medium IXCs' arguments that DS1 rates should be based on their suggested benchmark ratios. Ignoring these cost factors would erect a non-cost-based price umbrella, similar to the equal charge rule, and hamper access competition. Moreover, any single industry-wide ratio for DS1 and DS3 rates is unlikely to be an accurate reflection of cost differences for all LECs, and would probably have to be changed over time as technology changes the relevant cost factors.

**54.** We are not persuaded by CompTel's arguments based on selected state commission decisions and statements of their officials. We note that five of the states in BellSouth's region have permitted intrastate transport rates mirroring interstate transport rates to go into effect.[110] Of course, state commissions apply state statutory and regulatory standards, rather than the standards of the Communications Act of 1934 and the Commission's rules. Moreover, CompTel appears to have overstated the pertinence of some of the state commission decisions it cites. For example, the Louisiana Public Service Commission did not reject BellSouth's intrastate transport rates because those rates were not cost-based, but because BellSouth had simply proposed interstate transport rates for intrastate transport without attempting to satisfy relevant state requirements.[111] In addition, the MFJ's requirements are independent obligations of the BOCs and are not binding on the Commission. The precise meaning of the MFJ requirements cited by CompTel have not been settled by any Department

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[109] *First Transport Order*, 7 FCC Rcd at 7031, ¶ 48.

[110] *See* Letter from W.W. (Whit) Jordon, Executive Director - Federal Regulatory, BellSouth, to Kathleen Wallman, Chief, Common Carrier Bureau, dated December 7, 1994, at 1.

[111] *See* Oral Presentation by Staff Attorney Kellner, Louisiana Public Service Commission, U-20800 (Nov. 9, 1994) at 3 (*attached to* Letter from Genevieve Morelli, Vice-President General Counsel, CompTel, to Kathleen Wallman, Chief, Common Carrier Bureau, dated November 21, 1994). *See also* Memorandum from Div. of Communications and Div. of Legal Services, Florida Public Service Comm., to Director, Div. of Records and Reporting, re Docket No. 921074-TP, *Petition for Expanded Interconnection for Alternative Access Vendors within Local Exchange Co. Central Offices by Intermedia Communications of Florida, Inc., et al.*, (Nov. 18, 1994) at 129-45 (*attached to* Letter from Genevieve Morelli, Vice-President General Counsel, CompTel, to Kathleen Wallman, Chief, Common Carrier Bureau, dated December 6, 1994).

of Justice or court interpretation, and, in adopting the MFJ, the Court stated that regulators retained authority over ratemaking issues.[112]

**55.** We continue to believe that special access rates provide a rational framework for establishing the initial transport rates. First, the special access rate structure includes elements that are closely analogous to the transport portion of the switched access network. For example, the special access channel termination from the IXC POP to the SWC parallels the entrance facilities of the switched access network between the IXC POP and the SWC. The special access interoffice links are comparable to direct-trunked transport between SWCs and end offices. The LECs often provide special access and transport services over the same facilities.[113]

**56.** Second, special access rates provided a generally reasonable framework for the initial restructured transport rate levels. LEC special access rates have been subject to the discipline of both a certain degree of competition and the tariff review process. In adopting LEC price caps, we specifically concluded that pre-existing special access rate levels were a reasonable basis from which to launch a system of price cap regulation. We stated:

> The July 1, 1990 rates . . . represent the culmination of years of developing, refining, and overseeing the Commission's access charge system. The rates resulting from this process, while perhaps not perfect, in general represent the best that rate of return regulation can produce.[114]

We cited a number of factors in support of this conclusion: the revised Uniform System of Accounts; the newly-instituted cost allocation procedures used to separate non-regulated costs from regulated costs; the refined methodology for selecting the allowed rate of return; our ability to track costs through an automated reporting system; and increasingly sophisticated tariff review procedures, including the use of Tariff Review Plans with standardized cost support.[115] Most significantly, we noted that we had paid particularly close attention to the LECs' special access rates, and had conducted special proceedings to ensure that special access rates and rate relationships were reasonable.[116] Special access rate changes between July 1991 and September 1992 -- the effective date of the special access rates on which the initial restructured transport rates were based[117] -- complied with the requirements of the LEC price cap rules.

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[112] *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 169 n.161, 196 n.271 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983). The MFJ characterized its "equal charge rule" as an exception to the general requirements cited by CompTel. *See supra* ¶ 41.

[113] *First Transport Order*, 7 FCC Rcd at 7012, ¶ 13.

[114] *LEC Price Cap Order*, 5 FCC Rcd at 6814, ¶ 232.

[115] *Id.* at 6815, ¶¶ 233-36.

[116] *Id.* at 6815-16, ¶¶ 237-40.

[117] *First Reconsideration Order*, 8 FCC Rcd at 5374, ¶¶ 23-25.

**57.** Our approach of presuming LECs' initial restructured transport rates to be reasonable if based on special access rates, subject to a limited benchmark requirement, enabled us to implement the new transport rate structure expeditiously and without extensive and prolonged cost studies. Such cost studies could have delayed the development of access competition and prolonged the inefficiencies resulting from the equal charge rule.

**58.** The recommendations of CompTel, WilTel, and Sprint to establish permanent rate relationships using a revised benchmark would require the LECs to move their DS3 and DS1 rates, and in some cases their tandem-switched transport rates, essentially in lock step. These plans, as well as Sprint's and Allnet's alternative recommendations, would require equivalent reductions or increases in one set of rates for each reduction or increase in another rate. We believe that requiring permanent rate relationships between DS3, DS1, and tandem-switched transport rates would interfere with the efficient functioning of the market, and could retard long-distance price reductions, depress telecommunications usage, and inhibit economic growth. Moreover, permanent rate relationships interfere with the market by hampering the LECs' ability to adjust their rates to reflect changes in the underlying costs of their services, contrary to the goals of this proceeding and price cap regulation.

**59.** We reject the related recommendation to require the LECs to reset their tandem-switched transport rates annually based on DS3 and DS1 direct-trunked transport rates, weighted based on updated fiber/copper ratios. We continue to believe that price cap rules, rather than required annual adjustments guided by cost factors, are the most appropriate means, in an increasingly competitive access market, to govern ongoing changes in rates for LEC services, including tandem-switched transport.

**60.** We also decline to require the LECs to place uniform overhead loadings on their transport rates as a means of constraining changes to the price relationships between DS3 and DS1 rates. Overhead loadings may reasonably differ for higher and lower capacity access services. Thus, in response to some IXCs' allegations that, as a general matter, the LECs' restructured transport rates are unreasonably discriminatory, we conclude that even if it were demonstrated that different transport services are "like services," differences between the levels of overhead loadings recovered in those rates would not necessarily constitute unreasonable discrimination. (We note that allegations that specific rates of individual carriers are discriminatory are not before us in this proceeding.) Moreover, one of the primary benefits to consumers of price cap regulation is that it encourages efficient pricing. By placing similar services into the same basket, service category, or service subcategory, and subjecting them to aggregate pricing bands, our price cap rules allow a carrier a limited measure of pricing flexibility. Where marginal costs are below average costs, this pricing flexibility permits LECs to recover their total costs while minimizing adverse impacts on consumer surplus -- the difference between the price of a service and what consumers would be willing to pay for that service.[118]

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[118] *See Expanded Interconnection Remand Order*, 9 FCC Rcd at 5199, ¶ 163 (citing *National Rural Telecom Ass'n*, 988 F.2d at 182-83 (D.C. Cir. 1993)).

**61.** While we continue to believe that a certain level of pricing flexibility is needed to enable the LECs to meet increasing competition in the local access market, we also recognize that without sufficient regulatory constraints the LECs could price their transport services anti-competitively. We have addressed this concern through special safeguards in the price cap system: placing DS3 flat-rated transport, DS1 flat-rated transport, and tandem-switched transport in separate service categories and subcategories, and retaining the +2% upper pricing band for tandem-switched transport services. This +2% pricing band requirement is significantly more narrow than the typical +5% band for other service categories in the trunking and other baskets. We continue to believe that this approach best balances our concerns about potential anti-competitive LEC pricing and the LECs' need for some pricing flexibility in the face of increased competition, and thus, best promotes our public interest goals. We note, however, that this decision does not limit our discretion in addressing the separate record developed in the *LEC Price Cap Review* proceeding.[119]

**62.** Applying the Benchmark Separately to Different Transport Segments. We decline to require the LECs to satisfy separate benchmark requirements for entrance facilities and for direct-trunked transport. The method we used to create the benchmark was based on a typical configuration of LEC transport offerings, using rates from analogous special access offerings. This configuration is one IXCs would likely use to purchase transport services, and CAPs are likely to offer services that could be substituted for both entrance facilities and interoffice facilities. Given that the 9.6 to 1 benchmark was derived from examining rates for typical special access service configurations, applying the 9.6 to 1 benchmark to a comparable transport configuration on a bundled basis was reasonable. The benchmark approach was a reasonable method of ensuring that outlier special access rates did not form the basis for the initial transport rates under the interim plan.

**63.** Methodology for LECs with Rate Ratios Below the Benchmark. We decline to revise the method by which those LECs with September 1992 special access rates below the 9.6 to 1 benchmark established initial transport rates. Permitting such LECs to establish new transport rates without any check on the manner in which it was to be done would have provided such LECs with the opportunity to shift costs from facilities-based rate elements to the interconnection charge. Such a shift could harm access competition because LECs could price their transport services by offsetting lower rates for facilities-based services, with which CAPs compete, with a higher interconnection charge, paid by the customers of both CAPs and LECs. We conclude that the risk of any significant divergence between special access and transport rates is minimal, because over time, given the pricing flexibility afforded LECs under price cap regulation, LECs have the ability and market incentives to align those rates. In these circumstances, we are reluctant to permit the interconnection charge to increase without a clear indication that such an increase is in the public interest.

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[119] *Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994) (*LEC Price Cap Review*).

**64.** Finally, while we base our decision here on the public interest considerations stated above and in the *First Transport Order*, and not on the impact data, we note that the impact data from the quarterly reports indicate that the total costs for interstate switched access service for the smaller IXCs are consistent with the previous LEC estimates.[120] Therefore, the impact data do not indicate that we need to modify our benchmark requirement or establish permanent rate relationships to preserve full and fair interexchange competition. The impact analysis submitted by CompTel shows results that are generally consistent with the data in the LECs' monitoring reports.[121] Consistent with our past practice, we examine changes in total switched access rates, rather than examining transport rate changes in isolation. A measure of the effect on total switched access more accurately reflects the effect of the restructure on the IXCs, because it considers the entire bill they pay for LEC switched access rather than focusing only on one segment of the IXCs' access costs. CompTel's transport numbers, showing an industry average increase of approximately 10% in the transport costs of smaller IXCs compared to those of AT&T for the third quarter of 1994, are generally consistent with the data reported by the LECs. Transport rates represent approximately 22% of total interstate switched access rates. Thus, a 10% transport impact differential is roughly equivalent to a 2.2% switched access differential, which is consistent with the LECs' estimates before the transport restructure took effect, and is in the same general range as the amounts reported by the LECs.

### C. Price Cap Service Categories and Price Bands

**65.** Background. In our 1992 *First Transport Order*, we created three new service categories in the traffic sensitive basket in place of the formerly bundled transport service category: (1) a combined category including entrance facilities, direct-trunked transport and dedicated signalling transport (collectively referred to as "flat-rated transport"); (2) tandem-switched transport; and (3) the interconnection charge.[122] In our 1994 *Second Transport Order*, we modified the price cap baskets and service categories to reflect the new rate structure and pricing. Specifically, we modified our price cap rules to place flat-rated transport and special access into the same service category of the newly created trunking basket.[123] DS1, DS3, and voice grade flat-rated services were grouped together into separate categories or subcategories. Tandem-switched transport and the interconnection charge were also placed into separate service categories. Placing services in different baskets prevents LECs from shifting revenue recovery from a service in one basket to a service in a different basket. Separate service categories, on the other hand, limit, but do not completely foreclose, price cap LECs' ability to offset lower rates for more competitive services with higher rates for less competitive services.

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[120] *See* Table 1, *supra*.

[121] Letter from James M. Smith, President, CompTel, to Reed E. Hundt, Chairman, FCC, dated December 7, 1994, at 6.

[122] *First Transport Order*, 7 FCC Rcd at 7042-43, ¶¶ 70-76.

[123] *Second Transport Order*, 9 FCC Rcd at 623-27, ¶¶ 16-25.

**66.** We also retained the pricing bands established in our 1992 *First Transport Order*. We placed a typical upper and lower pricing band of +/-5% on the flat-rated transport and special access service category. We placed DS3 and DS1 flat-rated services into separate subcategories in order to limit the LECs' ability to offset rate reductions for higher-volume customers with rate increases for lower-volume customers. We placed an upper band of +2% and a lower band of 5% on the tandem-switched transport service category. The +2% upper band permits some pricing flexibility, while preventing precipitous rate increases that might adversely impact smaller IXCs that more commonly rely on tandem-switched transport services. We placed an upper band of +0% (with no lower band) on the interconnection charge service category.[124]

### 1. Tandem Switching

**67.** Positions of the Parties. In comments filed prior to our 1994 *Second Transport Order*, Pacific, SW Bell, and Rochester advocate putting tandem switching, together with local switching, into the traffic sensitive price cap basket, or in a new "switching" basket.[125] Rochester supports its recommendation by arguing that as the architecture of LEC networks becomes more de-centralized and network functions are distributed more broadly among end offices (rather than being focused in specialized switching locations), tandem switches increasingly resemble end office switches, rather than switches that are distinctly higher in the traditional switching hierarchy.[126] Rochester also argues that tandem switches perform switching, not transport, functions. SW Bell contends that, although integrated switches perform both class 4 (tandem) and class 5 (end office) functions, separately and discretely, tandem and local switches are functionally the same; they simply operate on different types of traffic. Thus, SW Bell argues that all switched access customers benefit from, and should contribute to the cost recovery of, tandem switching.[127] SW Bell also proposes putting the interconnection charge into a "public policy" basket.[128]

**68.** CompTel and WilTel also support placing the tandem switching charge into the traffic sensitive basket with local switching, subject to the Commission's unbundling and setting rates for tandem switching pursuant to Open Network Architecture (ONA) policies.[129] CompTel argues that the Commission's decision to keep tandem and local switching separate is

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[124] *Id.* at 627-32, ¶¶ 26-36.

[125] Pacific First Order Reply at 8; Rochester First Order Petition at 16; SW Bell First Order Opposition at 11-13.

[126] Rochester First Order Petition at 16-17.

[127] SW Bell Second Order Reply at 1-4.

[128] SW Bell First Order Opposition at 11-12.

[129] CompTel Second Order Petition at 4-11; CompTel Second Order Reply at 5-7; WilTel Second Order Petition at 20-21; WilTel Second Order Reply at 7-8.

premised on the mistaken understanding that end office switching and tandem switching are performed at separate locations.[130] CompTel asserts that the tandem switching function is typically performed in integrated switches where end office switching and tandem switching are separate functions in the same switch.[131] In addition, CompTel and WilTel urge the Commission to implement its ONA policies to separate discrete switching functions and establish direct-cost based rates for the tandem switching element by means of the ONA Switching Cost Information System (SCIS) model. According to CompTel, this process will align tandem-switched transport rates more closely with costs and reduce the interconnection charge. CompTel asserts that non-cost-based tandem switching rates have anti-competitive effects on third-tier IXCs and provide all IXCs incentive to employ excessive capacity of direct-trunked transport.[132] The chief executive officers of five of CompTel's member companies urge that the Commission "replace the tandem switching charge with a single switching charge applicable to all transport options."[133]

**69.** Ameritech, BellSouth, and AT&T oppose eliminating the tandem switching element and incorporating it into the local switching charge. They assert that, while tandem and local switching may be combined into a single switch, their functions remain separate and the competitive pressures on the two services differ.[134] In addition, AT&T, BellSouth, and Minnesota Equal Access Network Services (MEANS, a centralized equal access provider) view a single switching charge (local and tandem) as akin to the equal charge rule, arguing that all customers of switching services will be required to pay for tandem-switched transport whether or not such customers use tandem switching.[135] MEANS argues that a unitary switching charge will permit LECs to cross-subsidize their tandem switching with local switching, thereby undercutting competition in providing tandem switching.[136] Bell Atlantic argues that a single switching charge is inconsistent with the Commission's cost allocation rules: Sections 69.306(c)

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[130] CompTel Second Order Petition at 5.

[131] CompTel Second Order Petition at 5. CompTel cites evidence that in four of the states served by BellSouth 24 of the 29 BellSouth switches which provide tandem switching are integrated switches. *Id.*

[132] CompTel Second Order Petition at 10.

[133] Letter to Reed Hundt, Chairman, FCC, from Bernard J. Ebbers, CEO, LDDS Communications, C. Alan Peyser, CEO, Cable & Wireless, Roy Wilkens, CEO, WilTel, H. Brian Thompson, CEO, LCI International Telecom Corp., and Larry James, CEO, U.S. Long Distance, dated December 7, 1994, at 3.

[134] Second Order Oppositions of: Ameritech at 4; AT&T at 7; BellSouth at 16-17.

[135] Second Order Oppositions of: AT&T at 9; MEANS at 8-9; BellSouth at 17.

[136] MEANS Second Order Opposition at 7-10.

and (d) require the costs of local (Category 3) and tandem (Category 2) switching equipment to be separately accounted for based upon relative use.[137]

**70.** Several parties oppose applying ONA policies to setting rates for tandem and local switching services. Ameritech and USTA argue that ONA policies apply to local switching services used by enhanced service providers and not IXCs, and that ONA policies presume a local bottleneck, which they suggest is not the case here.[138] USTA, Rochester, GTE, and MEANS argue that applying an ONA methodology to switching charges is beyond the scope of, and too involved for, this proceeding.[139] SW Bell argues that price management of all switching cost recovery, including tandem switching, should be performed through use of a new switching basket, but that the price regulations should not dictate either a single rate element or any specific number of discrete (codified) rate elements, since this would be contrary to the price cap policies.[140]

**71.** Discussion. We decline to place tandem switching and local switching into the same price cap basket, whether that basket is the traffic sensitive basket or a new "switching" basket. We note also that this decision does not limit our discretion in addressing the separate record developed in the *LEC Price Cap Review* proceeding. The record in this proceeding has not persuaded us that local and tandem switching are similar services so likely to face similar competitive pressures in the near future as to warrant placing them together in the same price cap basket. In most parts of the country, local switching is provided currently by the LECs essentially on a monopoly basis. We have recently taken steps, in our expanded interconnection proceeding, to open direct competition for LEC tandem switching, by requiring LECs to provide the signalling functions that enable competitors to offer tandem switching.[141] Even without this tandem signalling, under the transport restructure, direct-trunked transport can sometimes be substituted for tandem-switched transport. Placing tandem and local switching in the same price cap basket would then permit LECs to offset lower rates for tandem switching with higher rates for local switching, while keeping them in separate baskets prevents this from happening. A basket and service category structure that permitted cross-subsidization of tandem switching would not be in the public interest because it would permit the LECs to undercut

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[137] Bell Atlantic Second Order Opposition at 4.

[138] Ameritech Second Order Opposition at 5; USTA Second Order Comments at 3-4. CompTel counters by (1) noting that no distinction exists for purposes of ONA between enhanced service providers and IXCs; and (2) stating that tandem-switched transport is no less a bottleneck than local switching. CompTel Second Order Reply at 6. *Accord*, WilTel Second Order Reply at 8.

[139] Second Order Oppositions of: USTA at 3-4; MEANS at 14; GTE at 7-8; Rochester at n.4 (arguing that CompTel's recommendation is nothing more than a collateral attack on the Commission's decision to use existing rates as a starting point for transport restructure).

[140] SW Bell Second Order Opposition at 3-4.

[141] *Expanded Interconnection with Local Telephone Company Facilities*, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994).

tandem competition unfairly.[142] Therefore, we see no reason to treat tandem switching differently from tandem-switched transport transmission elements, and we retain the tandem switch element in the tandem-switched transport service category.

**72.** We also reject SW Bell's proposal to place the interconnection charge into a separate "public policy" basket. As we stated earlier, until we have completed our evaluation of what underlying costs are recovered in the interconnection charge and how the interconnection charge revenues should be reallocated or otherwise disposed of, we conclude that the interconnection charge service category should be included in the trunking basket.[143] The present record has not identified any public interest reason for placing the interconnection charge into a new public policy basket.

**73.** Finally, we decline to price the tandem switching element incrementally, or to eliminate that element. Under our Open Network Architecture (ONA) policy, we required the LECs to unbundle special switching features and functions useful for enhanced service providers (ESPs), known as basic service elements (BSEs), from their underlying local switching services.[144] This enabled ESPs to purchase only those BSEs that they needed.[145] We required the LECs to set prices for BSEs based on the incremental costs of providing those services; all residual costs remained in the local switching element.[146] Tandem switching, however, is not a BSE. Because tandem switching is used to provide basic network services, not enhanced services, tandem switching does not constitute a BSE within the ONA framework. In addition, while pricing the tandem switching element based on incremental costs, as if it were a BSE, might lower rates for tandem switching, such a change could raise rates for local switching by shifting any residual costs from tandem switching to local switching. This would impose costs of tandem switching on local switching customers whether or not they use tandem switching. It could also undercut competition in the provision of tandem switching by permitting LECs to reset rates for tandem switching with unreasonably low (or no) overhead allocation. Eliminating the tandem switching element, as suggested by the chief executive officers of the CompTel member companies, would have similar results, but would more seriously undermine competition in the provision of tandem switching and impose tandem switching costs on customers, regardless of the extent of their use of tandem switching. We conclude that such measures would not be in the public interest.

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[142] *See infra* ¶ 76.

[143] *Second Transport Order*, 9 FCC Rcd at 622-23, ¶ 14.

[144] *See* 69 C.F.R. § 69.2(mm). *See also Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub-elements for Open Network Architecture*, Report and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991).

[145] *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub-elements for Open Network Architecture*, 6 FCC Rcd 4524, 4528, ¶ 19.

[146] *Id.* 6 FCC Rcd at 4531-32, ¶¶ 38-48.

### 2. Price Cap Service Categories

**74.** Positions of the Parties. Some parties objected to our arrangement of price cap service categories in our 1992 *First Transport Order* in pleadings filed prior to our rearrangement of those service categories in our 1994 *Second Transport Order*. Several LECs object to the separate service categories established for direct-trunked transport, tandem-switched transport, and the interconnection charge, asserting that they result in decreased pricing flexibility for the LECs and arguing for either expansion of the bands to allow additional flexibility, or greater flexibility in pricing local switching.[147] SW Bell argues that there is no need for separate service categories for tandem-switched and direct-trunked transport because tandem-switched transport price increases will be constrained by the availability of less-expensive direct-trunked transport alternatives (offered by both LECs and others) and tandem-switched transport alternatives (offered by others under the Commission's Phase II Expanded Interconnection proposal).[148] MCI opposes SW Bell's proposal to eliminate price cap service categories and pricing bands, arguing that the Commission correctly created these restrictions to prevent anti-competitive LEC behavior.[149]

**75.** WilTel contends that, if ongoing benchmark requirements are imposed, there is no need to put direct-trunked and entrance facilities together in a single price cap service category and tandem-switched transport in a separate category. Instead, WilTel recommends that the Commission put entrance facilities in a separate category, and direct-trunked and tandem-switched transport together (subject to ongoing benchmark requirements), with +5% and -10% bands.[150] Sprint states that entrance facilities should be treated separately from interoffice facilities for price cap purposes, but argues that tandem-switched and direct-trunked transport rates should be linked separately in each zone.[151]

**76.** Discussion. In our 1994 *Second Transport Order*, we specifically placed tandem-switched transport, DS1, and DS3 flat-rated services into separate service categories and service subcategories in order to prevent the LECs from offsetting lower rates for services subject to more competition with higher rates for less competitive services. We concluded in that order, and continue to believe, that separate price cap service categories and pricing bands are sufficient to protect against potential anti-competitive behavior. Accordingly, we decline to eliminate the separate service categories and subcategories that apply to transport services.

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[147] U S West First Order Petition at 8-9. *Accord*, SW Bell First Order Petition at 11-13; SNET First Order Petition at 6-7; Ameritech First Order Opposition at 4-6.

[148] SW Bell First Order Opposition at 10-11.

[149] MCI First Order Opposition at 18-19. *Accord*, MFS First Order Opposition at 11.

[150] WilTel First Order Petition at 21-23.

[151] Sprint First Order Opposition at 18.

**77.** We also decline to put entrance facilities and interoffice facilities into separate service categories. IXCs take entrance facilities and interoffice facilities together, except when the traffic originates or terminates with end users directly served by the SWC, or when one segment is provided by an interconnector. Entrance facilities and direct-trunked transport are charged on a flat-rate basis, and they are provided over facilities dedicated to specific IXCs. Because interconnectors are likely to provide service between POPs and many end offices, their services are likely to substitute for both entrance facilities and interoffice facilities, thereby subjecting both services to substantially similar competitive pressure. Therefore, no sufficient reason exists to place entrance facilities and interoffice facilities in separate service categories and to restrict the LECs' pricing flexibility between these services.

### 3. Price Cap Bands

**78.** Positions of the Parties. CompTel and WilTel, in petitions filed prior to the *Second Transport Order*, argue that the LECs should not have any upward pricing flexibility for tandem-switched transport because the costs of newly installed tandem-switched transport facilities is declining and there is substantial risk of LEC manipulation of transport rates in an anti-competitive manner.[152] Several of the LECs oppose these requests, characterizing them as abandoning price cap regulation for transport services and unduly restricting LEC pricing flexibility.[153] Rochester responds that tandem-switched transport pricing is already subject to substantial constraints and that additional restrictions would hinder LECs' ability to compete, and they provide no offsetting benefit.[154] BellSouth contends that the IXCs' proposal would aggravate the mismatch between the competitive impact of switched access expanded interconnection and the interim rate structure.[155]

**79.** MFS argues that price cap LECs already have freedom to reduce their rates subject to the average variable cost standard, but that the price cap bands exist primarily to restrict the LECs' ability to increase rates for captive customers.[156]

**80.** Discussion. We decline to eliminate the limited upward pricing flexibility permitted for tandem-switched transport. We believe this would unduly restrict the LECs' ability to price tandem-switched transport and would be inconsistent with the flexibility price cap regulation was intended to give them. The +2% band is a significantly narrower banding

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[152] CompTel First Order Petition at 17-18; WilTel First Order Petition at 23. CompTel supports similar treatment for direct-trunked transport.

[153] First Order Oppositions of: Bell Atlantic at 4-5; NYNEX at 7-8; SW Bell at 11; USTA at 14; United at 6; GTE First Order Reply at 10.

[154] Rochester First Order Petition at 12.

[155] BellSouth First Order Opposition at 4.

[156] MFS First Order Opposition at 11.

requirement than the +5% typically allowed for service categories, and we believe it is sufficient to prevent significant price manipulation.

### D. The Interconnection Charge

#### 1. Mid-Course Adjustment to the Interconnection Charge

**81.** Background. In our 1992 *First Transport Order*, we concluded that the initial interconnection charge should be set in a way that would satisfy the general requirement, under the LEC price cap rules, that rate restructures be revenue-neutral to the LECs. Therefore, we originally directed the LECs to calculate the initial interconnection charge under our interim transport rate structure by: (1) computing the revenue they would receive from facilities-based transport charges (projecting the total amount of demand of facilities-based transport elements under the new rate structure and multiplying by the rates for those elements); (2) subtracting this revenue amount from (in the case of price cap LECs) their total revenue from transport under pre-existing rate and demand levels, or (in the case of rate-of-return LECs) their total transport revenue requirement established under the Part 69 rules, to obtain the interconnection charge revenue requirement; and (3) dividing the interconnection charge revenue requirement by the projected total number of minutes of use of the LEC interstate switched access network. Thus, the initial interconnection charge was to be calculated on a residual basis in order to make transport rates as a whole, under the new rate structure, revenue-neutral to the LECs.[157]

**82.** In our 1993 *First Reconsideration Order*, we modified the calculation of the interconnection charge to require the LECs to use historical facility demand and configurations, rather than projected demand after IXCs reconfigure their networks in response to the restructure.[158] We did this to counter-balance the LECs' incentive to under-estimate the projected demand for transport facilities and thereby inflate the interconnection charge, and because there was no method for the Commission or other parties to measure the accuracy of the LEC projections. We stressed, however, that the initial interconnection charge was to be calculated on a residual basis to further the goal of a revenue-neutral rate restructure. We did not intend that the LECs lose substantial amounts of revenue during the first year of the interim rate structure as a result of transport reconfigurations.[159] Therefore, to achieve an interconnection charge that was neither too high nor too low, we stated that we would permit a mid-course adjustment to the interconnection charge. In our 1993 *Second Reconsideration Order*, we adopted a technical correction to our rules that required price cap LECs to base their initial calculation of the interconnection charge on historical usage demand, instead of projected usage demand. To date, no LEC has requested a mid-course adjustment.

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[157] *First Transport Order*, 7 FCC Rcd at 7038, ¶ 61.

[158] *First Reconsideration Order*, 8 FCC Rcd at 5379, ¶ 51.

[159] *Id.*

**83.** Positions of the Parties. SW Bell seeks clarification that the mid-course adjustment to the interconnection charge permits LECs to recoup their under-recovered revenues for the period between the tariff's effective date and the mid-course adjustment effective date, as well as prospectively after the mid-course adjustment.[160] SW Bell argues that such an adjustment would simply constitute the correction of a prior rate order based on incorrect demand data, and would not be retroactive ratemaking.[161] SW Bell asserts that, if LECs cannot implement the transport rate restructure on a revenue-neutral basis and recover their legitimate costs, the restructure would be confiscatory.[162]

**84.** The IXCs oppose SW Bell's petition. They argue that any recoupment of past revenue shortfalls would constitute impermissible retroactive ratemaking.[163] They also argue that such changes would be contrary to the Commission's objective of encouraging LECs to reuse facilities freed by reconfiguration in an efficient manner, by guaranteeing recovery for such facilities even if they can be reused.[164] They oppose SW Bell's argument regarding confiscation, arguing that neither price cap nor rate of return regulation insulates carriers from the risk of demand shifts, and pointing out that the low-end adjustment mechanism in the price cap rules protects the LECs from substantial earnings erosion.[165]

**85.** Discussion. We clarify that the period to be used in calculating the amount of any mid-course adjustment to the interconnection charge is from the effective date of the initial transport tariffs (December 30, 1993) through December 31, 1994. This calculation will define the amount that will prospectively establish the appropriate level for the interconnection charge. We further clarify that the mid-course adjustment to the interconnection charge permits recoupment of under-recovered interconnection charge revenues from December 30, 1993 to the effective date of the tariff implementing the mid-course adjustment.

**86.** Before the restructure was implemented, we concluded that the restructure should be revenue-neutral, and specified that we would permit a mid-course adjustment, or "true-up", to the interconnection charge to attain more fully the goal of revenue neutrality to the

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[160] SW Bell First Recon. Petition at 2-3. *Accord*, First Recon. Comments of: NYNEX at 2; USTA at 2.

[161] SW Bell First Recon. Reply at 3.

[162] *Id.* at 6.

[163] AT&T First Recon. Comments at 3; CompTel First Recon. Comments at 3 (citing *Accounting for Judgments and Other Costs Associated with Litigation*, Notice of Proposed Rulemaking, 8 FCC Rcd 6655, 6658, ¶ 18 (1993); *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975)).

[164] AT&T First Recon. Comments at 4-5.

[165] First Recon. Comments of: AT&T at 5-6; MCI (SW Bell) at 4; MCI First Recon. Reply at 5-6.

LECs.[166] Without a mid-course adjustment to the interconnection charge, which initially was based on 1992 facilities demand, the rate restructure might fall significantly short of this goal if IXCs reconfigure their networks with lower-priced facilities.

**87.** The mid-course adjustment to the interconnection charge, should any LEC choose to avail itself of the adjustment, does not constitute retroactive ratemaking. The adjustment will affect only rates in effect after the date of the adjustment. It will not retroactively change the interconnection charge rates that customers already paid before the adjustment date.[167] Nor will the adjustment require recoupment of revenues from customers or refunds to customers without suspension and an accounting order pursuant to Section 204(a) of the Communications Act.[168]

**88.** That the mid-course adjustment will take into account revenues the LECs under-recovered before the date of the adjustment does not convert the adjustment into retroactive ratemaking. All interested parties were on notice prior to the effective date of the transport tariffs that the interconnection charge was subject to adjustment and that the purpose of that adjustment was to achieve more fully our objective of revenue neutrality during the transition from the old to the new rate structure.[169] Therefore, any adjustment at a later date merely constitutes the implementation of a prospectively established obligation affecting the LECs and all access customers. The prior notice that the interconnection charge would be subject to adjustment, and the unique nature of the interconnection charge mid-course adjustment in the context of the major, Commission-required transport rate restructure, distinguish this case from cases in which a carrier generally seeks to adjust its rates prospectively to recoup costs from an earlier period. We do not address whether or not such cases would constitute retroactive ratemaking.

**89.** The rule against retroactive ratemaking does not foreclose agency enforcement of pre-existing obligations, even if that action requires setting rates for a future period that are based in part on the costs of an earlier period. In *New England Telephone*, the court upheld a Commission order requiring carriers to make "a prospective rate adjustment to compensate for past surpluses."[170] The court held that the Commission had authority under

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[166] *First Transport Order*, 7 FCC Rcd at 7038, ¶ 61; *First Reconsideration Order*, 8 FCC Rcd at 5379, ¶ 51.

[167] *First Reconsideration Order*, at 5379, ¶ 51; *Second Reconsideration Order*, 8 FCC Rcd 6233, ¶ 4.

[168] *See* 47 U.S.C. § 204(a); *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (1992).

[169] *First Reconsideration Order*, 8 FCC Rcd at 5379, ¶ 51.

[170] *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).

Section 4(i) of the Communications Act[171] to require a corrective rate adjustment as a reasonable remedy to enforce its rate of return prescription, ancillary to the Commission's authority to regulate carriers' rates through a rate of return method.[172] Moreover, in *Lincoln Telephone*, the court affirmed the Commission's requirement that Lincoln Telephone charge an interconnecting IXC the rates set forth in a third party agreement, subject to later adjustment once the appropriate rate for Lincoln Telephone to charge was determined.[173] Similarly, in the instant case, Section 4(i) permits a mid-course adjustment to the interconnection charge, ancillary to our underlying authority to require the transport rate restructure.[174]

**90.** We clarify that the period from December 30, 1993 through December 31, 1994 is the period to be used in calculating the amount of any mid-course adjustments to the interconnection charge. An expiration date approximately one year after the transport restructure tariffs first became effective enables the LECs to evaluate the actual demand for their transport services over the entire first year of the new transport rate structure. An expiration date is necessary because we did not intend the interconnection charge to ensure that, for all time, the LECs would never recover less revenues than they did prior to the rate restructure. Rather, we intended that the interconnection charge yield only an initial rate restructure that was revenue-neutral. We interpret "initial" to apply to the first year after the implementation of the new rates. Subsequent changes to the interconnection charge will be governed by the price cap rules.[175] LECs must file requests for mid-course adjustments to the interconnection charge no later than March 31, 1995. We delegate authority to the Chief, Common Carrier Bureau, to specify the format and content of such filings.

### 2. Burden of Proof for the Mid-Course Adjustment

**91.** Background. We required a LEC seeking a mid-course adjustment to demonstrate that: (1) because of IXC network reconfigurations resulting from the transport rate restructure, actual demand for its interstate transport facilities is significantly less than the historical demand used to set the interconnection charge ; and (2) the LEC has not been able to

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[171] 47 U.S.C. § 154(i).

[172] *New England Telephone*, 826 F.2d at 1107-09.

[173] *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1107-08 (D.C. Cir. 1981).

[174] *See, e.g.*, 47 U.S.C. § 201(a) (authorizing the Commission to prescribe rules necessary to establish charges, practices, classifications in connection with communication services); § 203(b)(2) (authorizing the Commission in its discretion to modify tariff requirements); and § 205(a) (authorizing the Commission, after full opportunity for hearing, to determine and prescribe what classification, regulation, or practice is just, fair, and reasonable).

[175] In the further notice included in the *First Transport Order*, we sought comment on the nature of the revenues included in the interconnection charge and on the appropriate treatment of these revenues in the future. *First Transport Order*, 7 FCC Rcd at 7063-66, ¶¶ 133-141.

find alternative uses for these facilities.[176] We determined that the LECs should recover the cost of facilities they are able to reuse through charges for those new uses, not through the interconnection charge, both to avoid double recovery and to provide incentive to reuse such facilities. Furthermore, we determined that the LECs must show that any loss of demand is not due to competition from other access providers.[177] We determined that the interconnection charge should not reimburse the LECs for revenues lost to competing providers. To do so would unreasonably enrich the LECs and would undermine our polices to foster efficient access competition in the expanded interconnection proceeding.

**92.** Positions of the Parties. SW Bell takes issue with the burden of proof imposed on the LECs seeking a mid-course adjustment. SW Bell argues that the showing required is unfairly difficult, making it unlikely that the LECs will achieve revenue neutrality, and submits that losses due to reconfiguration should be assumed to be due to the transport restructure, rather than competition.[178] SW Bell asserts that a significant level of reconfiguration is likely to occur in the earlier part of the restructure, especially in light of the waiver of non-recurring charges.[179] A number of LECs support SW Bell's petition, arguing that the burden of proof required by the Commission imposes an extremely expensive and time-consuming burden of tracking trunk reuse.[180]

**93.** The IXCs assert that placing the burden of proof on the LECs is appropriate because carriers filing tariffs generally have the burden of proof, and because the LECs are in the best position to supply the necessary information on demand shortfalls and on competitors' use of switched expanded interconnection.[181] They argue that SW Bell's petition, in effect, seeks recovery of revenues even if the demand shortfalls were caused by competition from CAPs, which would suppress competition for switched transport.[182] MCI asserts that substantial losses due to reconfiguration are unlikely, given the time needed for IXCs to adapt their networks to

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[176] *First Reconsideration Order*, 8 FCC Rcd at 5379, ¶ 53; *Second Reconsideration Order*, 8 FCC Rcd at 6233, ¶ 4.

[177] *First Reconsideration Order*, 8 FCC Rcd at 5379 n.79.

[178] SW Bell First Recon. Petition at 4-5; SW Bell First Recon. Reply at 7-8.

[179] SW Bell First Recon. Reply at 6-7.

[180] First Recon. Comments of: Bell Atlantic at 1-3; USTA at 2-6; NYNEX at 3-6. *See also* NYNEX First Recon. Reply at 3 (arguing that low-end adjustment mechanism not designed to ensure that interconnection charge yields revenue neutral transport rate restructure).

[181] AT&T First Recon. Comments at 7-8 & n.14; CompTel First Recon. Comments at 4; MCI First Recon. Reply at 5.

[182] CompTel First Recon. Comments at 4-5; MCI First Recon. Comments (SW Bell) at 4-5.

the interim transport structure.[183] Moreover, MCI argues that the Commission need not, and should not, define how much revenue loss is "significant", that the mid-course adjustment permits LECs to recover revenues associated with traffic growth, and that the Commission should not revisit the issue of whether the initial interconnection charge is set based on historical or projected demand.[184]

**94.** Discussion. We decline to modify the burden of proof associated with the mid-course adjustment. The LECs have the burden of demonstrating a significant under-recovery of revenues that justifies an adjustment to the interconnection charge. We affirm our determination that the LECs must prove the extent to which they have not been able to reuse facilities no longer needed after IXC reconfigurations. We imposed this burden after analyzing the likely difficulty of enforcing our earlier requirement that LECs take into account other demand for the same facilities in order to prevent double recovery.[185] Only the LECs have the information necessary to analyze reuse, and the asserted difficulty of producing this information only lends further support to our conclusion that the LECs, not the Commission staff or other parties, should have the burden of coming forward with it.

**95.** We clarify, however, that the burden of proving that facilities could not be reused does not apply to facilities that are reused as a result of the transport restructure itself. For example, if a customer reconfigures its LEC entrance facility from 25 DS1 circuits to a lower-priced DS3 circuit running over the same physical facility, the "reuse" of that facility in providing DS3 service instead of DS1 service is not excluded from the computation of the interconnection charge. In such a case, the interconnection charge may reasonably include recovery of the difference between the price of the 25 DS1 circuits and the price of the DS3 circuit. The requirement that LECs show that they have been unable to reuse facilities applies to situations in which facilities are no longer used for interstate switched transport, and the LECs have not been able to put the facilities to any alternative uses. For example, if the customer terminates its use of the 25 DS1 circuits because, due to the transport restructure, it has decided to consolidate its POPs, and the LEC is unable to put the entrance facility to any alternative uses in its network, then the LEC may reasonably include recovery of the lost DS1 revenues in the interconnection charge.

**96.** We also affirm our determination that the LECs should have the burden of proving that demand losses result from the transport rate restructure rather than competition. While we intend that the transport rate restructure be revenue-neutral to the LECs, competition in the provision of switched transport is likely to result in revenue losses to the LECs. The

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[183] MCI First Recon. Comments at 3-4.

[184] MCI First Recon. Reply at 4-5.

[185] *First Transport Order*, 7 FCC Rcd at 7039-40, ¶ 63. *See First Reconsideration Order*, 8 FCC Rcd at 5379, ¶ 52.

interconnection charge should not be used to shield LECs from the risks of revenue loss associated with growing competition.[186]

### 3. Waiver of Non-Recurring Charges

**97.** Background. In order to encourage IXCs to reconfigure their networks to make them more efficient and to reduce non-recurring expenses induced by the new transport rate structure on IXCs that reconfigure their networks, we required the LECs to waive certain non-recurring charges (NRCs) that apply when IXCs convert trunks from tandem-switched transport to direct-trunked transport or from direct-trunked transport to tandem-switched transport, or when an IXC orders the disconnection of trunks that were inefficiently used due to the skewed incentives created by the equal charge rule.[187] This waiver remained in effect until the end of June 1994, although some LECs voluntarily extended the waiver. During that period it appears that several IXCs reconfigured their networks to some degree.[188]

**98.** Positions of the Parties. Sprint suggests extending the period of time for the NRC waiver in light of the uncertainties related to Commission action on switched transport expanded interconnection and reconsiderations in this proceeding.[189] CompTel recommends expanding the waiver of NRCs to include all termination penalties in contracts for entrance facilities, arguing that significant regulatory changes have made such liabilities unreasonable and that, if termination penalties are not waived, IXCs could be forced to continue using outmoded copper facilities into the next century.[190] BellSouth opposes this recommendation, arguing that, unlike general termination penalties, termination charge liabilities under special construction tariffs are related to capital expenditures and are based on the extent to which the costs of facilities constructed for a single customer are non-recoverable. In such circumstances, according to BellSouth, waiver of termination liability for such facilities would deny LECs recovery of the remaining capital investment.[191]

**99.** AT&T argues that the waiver of NRCs should be clarified to cover other rearrangements that will occur as a result of the transport rate structure change, such as the

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[186] *See First Reconsideration Order*, 8 FCC Rcd at 5371, ¶ 53 & n.79; *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7430, 7436, ¶¶ 129, 144.

[187] *First Transport Order*, 7 FCC Rcd at 7038, ¶ 60. *See also* 47 C.F.R. § 69.126.

[188] *See generally* Local Transport Restructure Quarterly Monitoring Reports set forth in Appendix B attached hereto.

[189] Sprint First Order Petition at 21; Sprint First Order Reply at 10.

[190] CompTel First Order Petition at 24-25.

[191] BellSouth First Order Opposition at 14-15.

consolidation of separate trunks into higher capacity facilities.[192] USTA requests clarification that the NRC waiver applies only once per trunk -- in other words, the LECs should not be required to waive NRCs due to moving trunks from tandem-switched transport to direct-trunked transport and back again.[193]

**100.** SNET argues that the Commission has provided no opportunity for LECs to recover the costs associated with waived NRCs, and urges that a cost recovery mechanism (such as an exogenous change to price caps) be permitted.[194] SW Bell, U S West, and USTA generally oppose proposals to broaden the NRC waiver.[195]

**101.** Discussion. We decline to modify the scope of the NRC waiver. As a general matter, we conclude that to broaden the scope of the NRC waiver to include network reconfigurations not related to the rate restructure would be unfair to the LECs and beyond the scope of this proceeding. Specifically, we conclude that six months was ample time for the mandated waiver to be held open, especially since IXCs had more than one year to plan any network reconfigurations before the new rate structure became effective. We reject CompTel's recommendation that we require waiver of termination penalties in contracts for entrance facilities because we conclude that such a waiver would deny the LECs recovery of capital expenditures made specifically for a particular IXC.

**102.** We also decline to adopt AT&T's proposal to require LECs to waive NRCs for all IXC consolidations because it is moot and beyond the scope of this proceeding. It is moot because the LECs have already waived the application of NRCs to consolidations of DS1 to DS3 circuits and voice-grade to DS1 circuits.[196] To the extent that AT&T sought a waiver for consolidations to advanced facilities with capacities greater than that of DS3 service, such consolidations would not be triggered by the rate restructure. Moreover, we decline to restrict the NRC waiver to once per trunk, as USTA suggests, because, in light of the limited time period for which the waiver was available, we have no reason to believe that the significant churn envisioned by USTA occurred.

**103.** Finally, we conclude that, in their mid-course adjustment of the interconnection charge, the LECs are entitled, upon a proper showing, to take into account NRCs waived pursuant to the Commission's requirement. As part of the implementation process for the restructured rates, the initial interconnection charge was calculated employing the

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[192] AT&T First Order Petition at n.15; AT&T First Order Opposition at 21-22.

[193] USTA First Order Opposition at 18.

[194] SNET First Order Petition at 7-8. *Accord*, Sprint First Order Opposition at 17 (arguing to permit recovery of waived NRCs through the interconnection charge).

[195] First Order Oppositions of: SW Bell at 4-5; U S West at 7-8; USTA at 18.

[196] *Bell Atlantic, et al.*, 8 FCC Rcd 893 (1993).

previous year's NRC demand.[197] While this procedure was appropriate for purposes of implementing the initial tariffs, given that a true-up procedure was contemplated, it does not follow that a LEC should be precluded from seeking a true-up of the interconnection charge to bring the transport rate restructure closer to revenue neutrality. Therefore, if a LEC can demonstrate that, as a result of the Commission-mandated waiver of NRCs, the transport restructure yielded revenues significantly less than the amount it realized previously, in part, because the number of NRCs charged during the year fell short of the demand level used in calculating the initial interconnection charge, the LEC may seek a mid-course adjustment on this basis. Without some mechanism for recovering a significant shortfall in the level of NRC revenues recovered by the LECs, our goal of revenue neutrality would be jeopardized. At the same time, permitting such recovery is not inconsistent with our other goal of providing IXCs incentive to reconfigure their networks. Recovery through the interconnection charge does, however, spread the burden of the reconfigurations over all access customers.

**104.** For the same reasons discussed above in paragraphs 87-89, we conclude that the Commission has statutory authority to allow this type of recovery through the interconnection charge because it is necessary to maintain revenue neutrality and because carrying out such an adjustment does not constitute retroactive ratemaking. Given that NRCs may recover significant LEC costs, failure to permit recovery for significant shortfalls in NRC revenues could jeopardize our goal of revenue neutrality. Therefore, recovery is necessary to further our objectives with respect to the new transport rate structure. Moreover, all access customers and LECs were on notice prior to the effective date of the new transport tariffs that revenue neutrality was our goal and that the interconnection charge was subject to adjustment based on actual experience under the restructured rates. Therefore, adjusting the interconnection charge to account for the effect of the Commission-mandated waiver of NRCs is not retroactive ratemaking and is not inconsistent with the Act.

## E. Miscellaneous

### 1. Pricing Flexibility

**105.** Background. In the *Special Access Expanded Interconnection Order*, adopted concurrently with the *First Transport Order*, we found that volume discounts (*e.g.*, lower per-unit rates for service with the capacity of multiple DS3s) and term discounts (*e.g.*, lower per-unit rates when a customer commits to continue using the service over a multi-year period) are generally legitimate means of pricing special access services to recognize the efficiencies associated with larger traffic volumes and the certainty of longer-term arrangements.[198] In the *First Transport Order*, however, we prohibited term and volume discounts for switched transport services in order to ensure that the short-term impact on small IXCs was manageable and to allow IXCs time to adjust to rate changes under the interim rate

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[197] For a description of the formula for calculating the initial interconnection charge, see *supra* ¶¶ 81-82.

[198] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7463, ¶ 199.

structure.[199] We sought comment in the expanded interconnection proceeding on whether term and volume discounts should be permitted when switched transport expanded interconnection became operational.[200]

**106.** Based on those comments, in the *Switched Transport Expanded Interconnection Order*, we allowed LECs to offer reasonable volume and term discounts on transport facilities, subject to specified threshold requirements. We found that permitting volume and term discounts for switched transport represented a measured step toward giving the LECs the ability to respond to competition, striking a reasonable balance between giving the LECS too little or too much pricing flexibility. We determined that too much flexibility could stifle competitive entry and harm customers of less competitive services, while too little flexibility could deprive customers of the benefits of competition and send false economic signals to new entrants.[201] We made transport volume and term discounts, however, subject to the threshold conditions that parties using expanded interconnection have taken: (1) 100 DS1-equivalent switched cross-connects in the Zone 1 offices in the study area;[202] or (2) an average of 25 DS1-equivalent switched cross-connects per Zone 1 office in the study area.[203] We recently reaffirmed this threshold, although we adopted a modified definition of "operational" in light of the new mandatory virtual collocation policy.[204] Under that new definition, an offering will be considered "operational" if an interconnector has taken a cross-connect pursuant to a generally tariffed virtual collocation or physical collocation offering pursuant to the new rules adopted in the *Expanded Interconnection Remand Order*.[205]

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[199] *First Transport Order*, 7 FCC Rcd at 7035-36, ¶ 54.

[200] *Id.* at 7060, ¶ 125; *Expanded Interconnection with Local Telephone Company Facilities*, Second Notice of Proposed Rulemaking, 7 FCC Rcd 7740, 7746, ¶¶ 32-35.

[201] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7424, ¶ 91.

[202] A cross-connect is the cabling inside the LEC central office that connects the LEC network to the collocated equipment dedicated to a CAP using expanded interconnection. *See* 47 C.F.R. § 69.121(a). A Zone 1 office is a LEC end office located in the zone with the highest traffic density characteristics pursuant to the zone density pricing polices set forth in the expanded interconnection orders. *See infra* ¶ 107 for an explanation of density zone pricing.

[203] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7433-34, ¶¶ 115, 118. In study areas with no Zone 1 offices, the LECs may implement volume and term discounts once five DS1-equivalent switched cross-connects have become operational in the study area. LECs that have not implemented density zone pricing may implement volume and term discounts in a study area after customers have subscribed to 100 DS1-equivalent switched cross-connects in the study area. *Id.* at 7434-35, ¶ 118 & nn.263-65.

[204] *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5202, 5204, ¶¶ 174, 182.

[205] *Id.* at 5196, 5204, ¶¶ 155, 182.

**107.** In the *Special Access Expanded Interconnection Order*, adopted concurrently with the *First Transport Order*, we permitted the LECs to introduce density zone pricing of interstate high-capacity special access in a study area once their expanded interconnection offerings are operational in that study area.[206] Density zone pricing enables the LECs gradually to reduce their transport rates in areas of high traffic density, where the cost of providing service is typically lower than average, and to increase their transport rates in less dense areas, where costs are higher. In the *Switched Transport Expanded Interconnection Order*, we permitted the LECs to introduce density zone pricing of interstate switched transport in a study area once their switched transport expanded interconnection offerings are operational in that study area.[207] As with volume and term discounts, we concluded that density zone pricing for switched transport represented a balanced step to enable LECs to respond to increased competition.[208]

**108.** Positions of the Parties -- Volume and Term Discounts. In petitions filed prior to the *Switched Transport Expanded Interconnection Order*, CompTel, Sprint, and WilTel oppose volume discounts for interoffice transport between the end office and the SWC because they contend that, unlike entrance facilities, the interoffice transport network is a shared network and all customers should share in cost savings LECs realize based on the total volume of traffic carried over the network.[209] The LECs generally support lifting the prohibition on term and volume discounts because: (1) with the advent of expanded interconnection for switched transport, unless they can offer switched transport services with discounts like those the CAPs offer, they will lose the opportunity to compete for IXCs' business;[210] (2) the prohibition is designed merely to protect small IXCs with a vested interest in *status quo* pricing;[211] (3) without volume discounts, LECs, unlike CAPs, must maintain radically different rate structures for switched transport and special access;[212] and (4) such discounts are cost-justified and prohibiting

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[206] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7475, ¶ 179 & n.411

[207] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7426-27, ¶ 99 & n.230. *See also Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7475, ¶ 179 & n.411.

[208] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7424, ¶ 91. *See also Expanded Interconnection Remand Order*, 9 FCC Rcd at 5194, ¶ 146.

[209] CompTel First Order Opposition at 5-6; Sprint First Order Opposition at 10-11; WilTel First Order Opposition at 20-21.

[210] First Order Petitions of: USTA at 8-11; Bell Atlantic at 2-5; BellSouth at 8-9; Cincinnati Bell at 4-7; GTE at 5-7, 12-13; NYNEX at 5-7; Pacific at 8-9; Rochester at 14-16; SNET at 5-6; SW Bell at 15-17. Ameritech First Order Opposition at 3-4; GTE First Order Opposition at 13-15.

[211] Pacific First Order Petition at 6; Pacific First Order Reply at 4-7. *Accord*, SW Bell First Order Petition at 15.

[212] NYNEX First Order Petition at 7-10.

them is inconsistent with the principle that rates be cost-based.[213] The LECs generally support volume discounts for interoffice facilities.[214]

**109.** The LECs, as well as CompTel, MCI, and Sprint, generally support term discounts, which could benefit both small and large IXCs.[215] These parties also support the removal of the prohibition on volume discounts for entrance facilities because: (1) such facilities are dedicated to a particular IXC; (2) such facilities are shared between switched transport and special access services; and (3) the prohibition impedes an IXC's ability to obtain the benefits of ratcheting (*i.e.*, using the same LEC facilities for both special access and switched transport services).[216] MCI recommends that any volume discounts on entrance facilities be subject to rigorous cost justification and that the Commission ensure that such discounts are not anti-competitive or discriminatory.[217] WilTel also supports permitting volume discounts (as well as term discounts) on entrance facilities, provided that a high benchmark standard is in place to ensure non-discriminatory relationships among interoffice rates.[218]

**110.** MFS argues that the LECs continue to have substantial market power in the interstate access market, given their control of bottleneck facilities and their economies of scale and scope conferred by state policies, and consequently they should not be given additional pricing flexibility.[219] MFS further argues that, before permitting volume and term discounts for switched transport, the Commission should require LECs to eliminate excessive special access volume and term discounts, set prices for all capacity so that volume and term options are consistently proportionate to underlying costs and realign rates for different capacity levels to eliminate uneconomic crossover incentives and discrimination.[220] Ad Hoc argues that, without

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[213] *Id.* at 6-7, 12-13; GTE First Order Petition at 11.

[214] First Order Petitions of: USTA at 14-15; GTE at 9-10; Bell Atlantic at 5-6; NYNEX at 10-12; Cincinnati Bell at 7.

[215] First Order Petitions of: Ameritech at 3-4; Bell Atlantic at 5; Cincinnati Bell at 6; GTE at 7-8; NYNEX at 12; SNET at 5; U S West at 15; USTA at 12-13. GTE First Order Opposition at 13-14; MCI First Order Opposition at 13. *Accord*, CompTel First Order Opposition at 5; Sprint First Order Opposition at 10; WilTel First Order Opposition at 20 (supporting term discounts as long as such discounts are available to all IXCs, for DS1 direct trunks, DS3 direct trunks, tandem-switched transport, or a combination thereof).

[216] First Order Petitions of: U S West at 14; GTE at 8-10; Ameritech at 2-3; USTA at 14; First Order Oppositions of: CompTel at 4; MCI at 13; Sprint at 9-10; GTE at 14.

[217] MCI First Order Opposition at 13-14.

[218] WilTel First Order Opposition at 19-20.

[219] MFS First Order Opposition at 4-7 & nn.14-15.

[220] *Id.* at iii, 9-10; MFS First Order Reply at 3-4.

detailed, reliable studies on the impact of such discounts on smaller IXCs, the Commission should not alter the policy in the *First Transport Order*.[221]

**111.** Positions of the Parties -- Density Zone Pricing. In response to the *First Transport Order* and prior to our expanded interconnection orders, several parties advocate permitting density zone pricing of transport services.[222] Only MFS opposes geographic de-averaging, arguing that price cap LECs already can reduce prices for high capacity services, which are used primarily in dense urban zones anyway, using below-band filings, but that density zone pricing merely enables LECs to increase rates for lower capacity services in less dense zones.[223]

**112.** Sprint, in response to the *Second Transport Order*, argues that a better way of allowing the LECS to compete fairly with CAPs would be to remove the requirement that the initial price subindexes in each density zone be the same, and instead allow the LECs to propose nondiscriminatory, cost-based prices in the high density zones.[224] Sprint asserts that this will allow all IXCs (not just the largest) to share the inherently lower costs of providing access in such areas.

**113.** Discussion. We once again reaffirm that the LECs may offer term and volume discounts for switched transport services and may implement density zone pricing of switched transport, as set forth in the *Switched Transport Expanded Interconnection Order* and as reaffirmed and slightly modified by the *Expanded Interconnection Remand Order*. We decided these issues in the expanded interconnection proceeding, based on a separate and complete record. The present record, however, does not refute the need for this additional pricing flexibility in an increasingly competitive access market. Volume and term discounts and density zone pricing of switched transport, subject to the rules adopted in the expanded interconnection orders, ensure that LEC rates are not unduly constrained and that customers fully enjoy the benefits of increasing competition.[225]

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[221] Ad Hoc First Order Opposition at 4-5.

[222] First Order Petitions of: SW Bell at 17-18; Sprint at 5-7; WilTel at 14-15; First Order Oppositions of: GTE at 6-7; Ameritech at 4; USTA at 6-7; United at 7; CompTel at 5; MCI at 15; WilTel at 18 & n.22.

[223] MFS First Order Opposition at 11.

[224] Sprint Second Order Petition at 9-10. NYNEX states general support for Sprint's proposal. Second Order Opposition at 7.

[225] *See, e.g., Expanded Interconnection Remand Order*, 9 FCC Rcd at 5216, ¶¶ 144-48.

**114.** With respect to volume and term discounts, we clarify that the rules we adopted in the expanded interconnection proceeding regarding discounted transport offerings[226] contemplate only volume discounts (reduced per-unit prices for a particular number of units of service) and term discounts (reduced per-unit prices for a specified service for a particular period of time). These rules do not provide for percentage or growth discounts -- reduced per-unit prices for customers that commit to purchase a certain percentage of their past usage from a LEC, or reduced prices based on growth in traffic placed over a LEC's network.

**115.** Finally, with respect to density zone pricing, we reaffirm our requirement that the price subindexes (*i.e.*, the upper and lower pricing bands -- not the rate levels) be the same in each zone when a LEC introduces density zone pricing in a study area. The requirement initially limits the magnitude of the rate differentials among zones and introduces those differentials gradually to avoid sudden rate changes that could harm customers in higher cost areas.

### 2. Intermediate Hubbing and Tandem-Switched Transport

**116.** Background. In the *First Reconsideration Order*, we revised the definition of direct-trunked transport to permit hubbed configurations, which we concluded permit customers to use the network efficiently and facilitate interexchange competition.[227] As a corollary to that decision, we also modified our rules to enable customers to purchase tandem-switched transport in either of two configurations: (1) a per-minute charge for tandem-switched transport between the SWC and end offices, rated on the distance between the SWC and the end offices, without regard to the actual location of the intervening access tandem office, as required in the *First Transport Order*, or (2) a flat-rate charge for direct-trunked transport between the SWC and the access tandem office, and a per-minute charge for tandem-switched transport between the tandem office and the end offices, rated on actual distances.[228]

**117.** Positions of the Parties. Sprint requests a further modification to the definition of "tandem-switched transport" to include service between any customer-designated telephone company office and an end office.[229] According to Sprint, this clarification would permit IXCs to purchase (1) dedicated facilities to an intermediate hub that is not collocated at the SWC or at the tandem office; and (2) tandem-switched transport from that intermediate hub to an end office, rated based on the distance between the hub and the end offices without regard

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[226] 47 U.S.C. §§ 69.110(f)-(h), 69.111(i)-(k), and 69.112(f)-(h).

[227] *First Reconsideration Order*, 8 FCC Rcd at 5371, ¶¶ 7-8. Intermediate hubbing is a configuration of interoffice special access or dedicated transport facilities that permits an access customer to use higher-capacity facilities (*e.g.*, DS3 circuits) from the SWC to an intermediate hub office, and de-multiplex the traffic to lower-capacity facilities (*e.g.*, DS1 circuits) from the intermediate hub office to multiple end offices.

[228] *First Reconsideration Order*, 8 FCC Rcd at 5372, ¶ 9.

[229] Sprint First Recon. Petition at 2.

for the actual location of the intervening tandem office. Several IXCs argue that Sprint's petition would permit users of tandem-switched transport the same flexibility available to users of direct-trunked transport.[230]

**118.** No party opposes Sprint's proposal in theory, although several LECs generally assert that a certain amount of time would be necessary to implement the billing systems for such services.[231] Sprint responds that it would not oppose delaying the effective date for the rule changes it seeks until June 1, 1994, as long as the LECs waive the nonrecurring charges associated with establishing intermediate hubs until six months after that date.[232] MCI, however, argues that such rule changes should be effective immediately;[233] SW Bell replies that MCI's argument fails to account for the implementation difficulties.[234]

**119.** Discussion. We established an interim rate structure under which access customers could pay for tandem-switched transport between a SWC and end offices on a per-minute basis, with mileage measured directly between the SWC and the end office. This rate structure does not reflect the actual facilities used to provide tandem-switched transport: "[t]andem-switched transport between a serving wire center and an end office consists of circuits dedicated to the use of a single interexchange carrier or other person from the serving wire center to the tandem . . . and circuits used in common by multiple interexchange carriers or other persons from the tandem to the end office."[235] We adopted this rate structure "as a reasonable first step toward a cost-based, more rational rate structure,"[236] despite arguments by some parties that "a bundled tandem-switched transport rate precludes tandem interconnection and competition."[237]

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[230] WilTel First Recon. Comments at n.1; First Recon. Comments of MCI (Sprint) at 1-3 (MCI filed separate First Recon. Comments for Sprint and SW Bell).

[231] First Recon. Comments of: NYNEX at 7-8; Ameritech at 1; U S West at 2; GTE at 2; SW Bell at 2.

[232] Sprint First Recon. Reply at 2.

[233] MCI First Recon. Comments (Sprint) at 2-3.

[234] SW Bell First Recon. Reply at 8.

[235] 47 C.F.R. § 69.2(ss).

[236] *First Transport Order*, 7 FCC Rcd at 7021, ¶ 29.

[237] *Id.* at 7021, ¶ 28.

**120.** We decline to adopt Sprint's proposal. We have already adopted rules that enable tandem-switched transport users to obtain efficiencies through intermediate hubbing.[238] Both customers using tandem-switched transport and customers using direct-trunked transport are now able to use hubbed network configurations to reduce the cost of their dedicated transport circuits. For example, consider a customer using dedicated facilities from the SWC through an intermediate hub to a tandem office, and using common facilities from the tandem office to end offices. Under the current rules, the customer could purchase direct-trunked transport from the SWC to the hub and from the hub to the tandem, and purchase tandem-switched transport from the tandem to end offices. This rate structure, which reflects the way costs are incurred, gives tandem-switched transport customers the same opportunities as direct-trunked transport users to use hubbing to configure their dedicated transport circuits efficiently. By contrast, under Sprint's proposal, the tandem-switched customer could pay flat-rate direct-trunked transport from the SWC to a hub and usage-sensitive tandem-switched transport from the hub to end offices, even though the customer's traffic would use dedicated circuits from the hub to the tandem switch. Sprint's rate structure would not reflect the way costs are incurred, and would give tandem-switched transport customers an ability to determine the end points for flat-rated recovery not enjoyed by direct-trunked transport customers, who have to pay flat-rated recovery to the LEC's end office location. Sprint's proposal would substantially change the transport rate structure, and would lead to the pricing of more services in a manner that does not reflect the way facilities are deployed. Given our doubts about the efficiency benefits of Sprint's request and the fact that the existing rules already provide reasonable opportunities for tandem-switched transport users to compete with direct-trunked transport users, we decline to amend our prior decisions.

### 3. Meet Point Billing

**121.** Positions of the Parties. When transport services are provided by two or more LECs, such as a BOC and an independent LEC, meet point billing arrangements enable each of the LECs to issue a bill to the IXC. MEANS seeks clarification with respect to how the interim rate structure applies to its meet point billing arrangements with U S West and others. Specifically, MEANS contends that, in cases where a BOC, a centralized equal access provider, and an independent LEC jointly provide transport under meet point billing arrangements, if the BOC only provides a dedicated link, it should not be allowed to levy the tandem charge. In such a situation, MEANS contends that the BOC should not be able to levy the interconnection charge either, because, as MEANS argues, the interconnection charge primarily recovers tandem-related costs.[239] MEANS argues that, to the extent the interconnection charge constitutes a residual charge or subsidy, it should be levied only upon minutes of use originating and terminating at the BOC's exchanges where corresponding portions of the BOC's rate structure will be applied.[240] U S West seeks clarification that LECs only meet-point bill for those rate

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[238] *First Reconsideration Order*, 8 FCC Rcd at 5371-72, ¶¶ 7-9.

[239] MEANS First Order Petition at 9-14.

[240] MEANS First Order Reply at 4-6.

elements that are jointly provided, such as direct-trunked transport and tandem transmission, and not for entrance facilities or the tandem charge.[241] U S West agrees with MEANS that LECs should not apply the tandem sub-element charge if no tandem switching is provided, but argues that the interconnection charge should be applied by the LEC originating or terminating the traffic.[242]

**122.** Discussion. We conclude that specific methods for assessing, and avoiding double billing for, the tandem charge and the interconnection charge under meet point billing arrangements are better left to the individual parties involved, given the wide variety and diversity of such arrangements. If such issues cannot be settled among the parties, we can address them in the future in the tariff process or pursuant to specific complaints filed with the Commission.

### 4. Prohibition on Ratcheting

**123.** Background. In the *Special Access Expanded Interconnection Order*, we prohibited ratcheting -- the practice by interconnectors of using interstate special access expanded interconnection offerings to connect their transmission facilities with the LECs' interstate switched services.[243] In the *Switched Transport Expanded Interconnection Order*, we eliminated this prohibition once a LEC's tariff offering of expanded interconnection for switched transport has become effective.[244]

**124.** Positions of the Parties. In petitions filed prior to our *Switched Transport Expanded Interconnection Order*, Bell Atlantic and Rochester argue that the Commission should prohibit interconnector ratcheting.[245] MCI and Sprint argue that the ratcheting prohibition, once switched interconnection is implemented, would simply create wasteful duplicate connection facilities.[246]

**125.** Discussion. In the *Switched Transport Expanded Interconnection Order*, we concluded that interconnector ratcheting was beneficial to access customers and that retaining the prohibition on ratcheting once switched transport expanded interconnection has become effective is inefficient, artificially increasing the cost of interconnected services without any

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[241] U S West First Order Petition at 21.

[242] U S West First Order Opposition at 9.

[243] *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7420-21, ¶ 109.

[244] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7386 n.53. *See, also,* 47 C.F.R. § 69.1402(c).

[245] First Order Petitions of: Rochester at 15-16; Bell Atlantic at 8-9.

[246] First Order Oppositions of: Sprint at 19-20; MCI at 8.

accompanying benefits.[247] We continue to believe that ratcheting by interconnectors benefits access customers and competition, and therefore, decline to modify our rules with respect to ratcheting.

### F. Conclusion

**126.** The interim transport rate structure and pricing rules significantly improve upon the previous equal charge structure. The new structure permits LECs to offer transport services in a manner more consistent with how the LECs incur transport costs. More cost-based transport rates permit the LECs to offer the various transport services in substantially the same manner as CAPs, thus promoting competition. The full benefits of this competition, however, cannot reach consumers if the LECs' provision and pricing of their transport services are overly constrained. We conclude that relying upon our price cap rules to govern transport rates best balances the need for some pricing flexibility against the need for pricing constraints.

## IV. SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING

### A. Resale, Shared Use and Split Billing

#### 1. Introduction

**127.** Transport Rulemaking. The interim transport rate structure was implemented with the aim of achieving the three main public interest goals discussed *supra* in paragraph 8. From the start, the restructure aimed at encouraging the efficient use of transport facilities. In the *First Transport Order,* we noted that "smaller IXCs can reduce their access costs by reselling the services of other IXCs or by utilizing network sharing arrangements with other carriers to terminate interstate calls."[248]

**128.** Further, the *First Transport Order* expressly contemplated that "smaller IXCs may choose to aggregate their traffic together and share transmission facilities," and observed that "IXCs may be able to share a DS3 facility to transport either their originating or terminating traffic, allocating the individual circuits among themselves."[249] For example, while individual circuits on an entrance facility are always dedicated to a single access customer, several customers that share a POP may be able to share entrance facilities over which their dedicated circuits are carried. For such arrangements to be practical, it is necessary to develop procedures for LECs (and possibly also IXCs) to provide "split billing," that is, separate bills to different customers for use of shared entrance facilities.

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[247] *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd at 7386 n.53.

[248] *First Transport Order*, 7 FCC Rcd at 7086 (Appendix C).

[249] *Id.* at 7087 & n.212 (Appendix C).

**129.** The *Transport Orders*, however, did not mandate the means by which the LECs could implement such resale and sharing arrangements through either their tariffed transport offerings or their access billing systems. By this Supplemental Notice of Proposed Rulemaking, we propose requirements and seek comments on proposals for network sharing and resale arrangements aimed at ensuring the ability of the smaller IXCs and access customers to realize the maximum benefits from the local transport restructure.

### 2. Background

**130.** Prior to the implementation of the local transport restructure, all switched access was billed on a per minute of use basis. In general, LECs measured the usage for each access customer of record and rendered bills accordingly. Under the restructure, LECs had to assess flat-rated charges for transport facilities, thus requiring them to identify for the first time a customer of record for the billing of the entrance facilities and direct-trunked transport rate elements.[250] In those cases where multiple customers receive transport service from a single LEC provider over flat-rated transport facilities that they share, there are no established access billing arrangements to provide separate bills for fractionalized portions of such flat-rated facilities. This contrasts with meet point billing, discussed *supra* in paragraphs 121-122, which is a billing arrangement used where transport services are provided to a single customer by two or more LECs, so that each LEC may issue a single bill to the customer for its usage-based charges.

**131.** Transport Tariff Review. In their petitions to suspend or reject the local transport restructure tariffs filed on September 1, 1993, several petitioners raised issues relating to the resale, shared use and split billing of transport facilities.[251] Several petitioners sought tariff provisions that would allow "split billing" so that multiple customers of record could be billed by the LEC for fractionalized shares of a high-capacity facility. This billing option would allow an access customer to share or resell portions of such facilities and thereby maximize efficiency gains from the transport restructure.[252] For example, split billing could enable several small IXCs that share a POP to share entrance facilities and/or direct-trunked transport at a higher capacity than any of them could justify acting alone.

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[250] A "customer of record" is an access customer that receives bills and is responsible for paying access charges to a LEC.

[251] The parties filed the following petitions and replies in the transport restructure tariff review proceeding, which was resolved by a Common Carrier Bureau order, *Local Exchange Carrier Switched Local Transport Restructure Tariffs*, 9 FCC Rcd 400 (Com. Car. Bur. 1993)(*Tariff Order*): Petitions filed Oct. 7, 1993: CompTel Petition at 33-36; MCI Petition Appendix A at 17; Sprint Petition at 32-33; AT&T Petition at 36-38 (regarding split billing problem for Feature Group A access); Replies filed Oct. 25, 1993: Pacific Reply at 9-10; NYNEX Reply, Exhibit 13 at 1; BellSouth Reply at 55-57; SW Bell Reply at 22-29. These petitions and replies are summarized in the *Tariff Order*, 9 FCC Rcd at 422-27.

[252] *See Tariff Order*, 9 FCC Rcd at 422, ¶ 60.

**132.** Two LECs, SW Bell and NYNEX, acknowledged the need for split billing of entrance facilities and direct-trunked transport and included in their transport restructure tariffs provisions implementing split or shared billing arrangements.[253] SW Bell's "Interim Split Billing Option" requires that a "primary customer" of record be responsible for payment of the tariffed rates by all other customers sharing the facility. This requirement drew objections from both AT&T and CompTel on the ground that one IXC should not be forced to bear the risk of non-payment by other IXCs sharing the same facility.[254]

**133.** NYNEX's "Shared Billing Arrangement" allows for the billing of multiplexed DS1 or DS3 facilities to be split from the multiplexer between two or more customers.[255] CompTel also objected to the NYNEX arrangement as narrowly limited to situations where higher capacity switched access service is multiplexed onto a lower capacity service (or when a special access service is provided over DS1 or DS3 facilities). CompTel argued that the arrangement does not permit split billing of the higher-capacity service, and because of the limited situations in which it can be used, does not satisfy the needs of IXC customers for a meaningful split billing offering.[256]

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[253] *Tariff Order*, 9 FCC Rcd at 425-26, ¶¶ 67-70.

[254] *Tariff Order*, 9 FCC Rcd at 423-24, ¶ 63; SW Bell Description & Justification filed November 15, 1993 at 2-1 to 2-8. *See* SW Bell Tariff F.C.C. 73, Section 6.8.15; NYNEX Tariff F.C.C. No. 1, Section 6.7.14.

[255] *Tariff Order*, 9 FCC Rcd at 424, ¶ 65; NYNEX Reply, Exhibit 13 at 1; NYNEX Tariff F.C.C. No. 1, Section 6.7.14; NYNEX Description & Justification at Section II.

[256] *Tariff Order*, 9 FCC Rcd at 424; CompTel Comments filed November 30, 1993 at 7 n. 2.

**134.** AT&T raised another reason for split billing, triggered by anticipated Feature Group A billing changes. [257] AT&T claimed that, as a result of the transport restructure, various LECs had indicated their intent to bill the IXC at whose POP the entrance facility terminates rather than the customer of record for Feature Group A entrance facilities and direct-trunked transport. AT&T requested that the Commission clarify that the *Transport Orders* did not contemplate or permit any changes to the identity of the customer of record for Feature Group A service.[258]

**135.** Various LECs opposed a split billing requirement. Unlike SW Bell and NYNEX, many LECs have no plans to provide a billing option that would apportion the charges for entrance facilities and direct-trunked transport among several customers, and generally oppose such an approach. Pacific explained that, prior to the restructure, it did not provide split billing for trunking facilities; rather, it measured minutes of use for each customer and billed those customers accordingly. With the imposition of flat-rated charges for entrance facilities and direct-trunked transport, it could not determine which carriers are using what proportions of a particular shared facility, and therefore could not provide them with separate bills.[259] BellSouth maintained that the customer who orders the particular interface and the associated facility should be billed for the interface at the customer premises at a higher capacity facility.[260] SNET explained that Feature Group A is a line side connection into an end office switch and therefore

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[257] Following divestiture, the LECs' switched access tariffs offered four types or "feature groups" of switched access service: A, B, C, and D. Feature Groups A and B are local exchange services that are used to provide interstate access, with service characteristics on the originating end that differ from Feature Group D, the equal access connection now used by most IXCs in equal access areas. Feature Groups A and B were very important services in the initial period after access charges were created, before the significant expansion of equal access offices. Feature Group A access provides a customer with dedicated transmission facilities from an IXC's POP to an end office, called the dial tone office, and a seven-digit number through which end-users located within the carrier's service area wishing to call the customer can place such calls. *See First Reconsideration Order*, 8 FCC Rcd at 5372-73, 5385, ¶¶ 15-18 & Appendix B, Diagram 2. Feature Group B, by contrast, is a trunk-side connection; calls are processed through the end office switch or access tandem. The originating caller must use a seven-digit access number, but the number is the same nationwide. Carrier access codes are in universal format: 950-XXXX. In the terminating direction, calls terminate at subtending end offices where access tandems are employed and at end offices where connection to an end office is directly made. Because Feature Group B is a trunk-side connection, Feature Group B offers greater functionality and is more useful for IXC services. Feature Group B is also currently used to connect callers to enhanced service provider offerings in lieu of 800 number access because the Feature Group B number is the same nationwide.

[258] *Tariff Order*, 9 FCC Rcd at 423, ¶¶ 61-62. Although AT&T only raised the split billing issue with respect to Feature Group A customers in its tariff protest, the issue applies equally to Feature Group B customer billing under the transport restructure.

[259] *Tariff Order*, 9 FCC Rcd at 424, ¶ 65; Pacific Reply at 9-10; *accord* GTE Reply at 27-28; BellSouth Reply at 53.

[260] *Tariff Order*, 9 FCC Rcd at 424-25, ¶ 66; BellSouth Reply at 55-57; *accord* Ameritech Reply at 20.

requires voice grade capacity for direct-trunked transport. Because AT&T requests a DS1 interface at its POP for all of its Feature Group A lines, SNET stated that it intended to bill AT&T for the DS1 facilities between AT&T's POP and the Feature Group A dial tone office, and to bill the end-user for the voice-grade facilities between the dial tone office and the end-user premises.[261]

**136.** In the *Tariff Order*, the Common Carrier Bureau agreed that split billing by the LECs is crucial to assuring that customers can obtain the maximum benefits from the restructured transport rates. The Bureau further observed that, although the *Transport Orders* prohibited restrictions upon resale and sharing, they did not specify how the LECs were to facilitate such arrangements. The Bureau urged all LECs to follow the examples of NYNEX and SW Bell by accommodating customers who desire split billing services so that they could establish the most efficient and cost-effective service arrangement. The Bureau directed the LECs to refer the split billing problems described in the order to the industry's Ordering and Billing Forum (OBF) for resolution, and requested that the LECs report to the Bureau within three months on their progress in resolving these issues. The Bureau suggested that, if the carriers failed to make substantial progress toward a successful resolution, the Commission might consider prescribing a method for providing split billing.[262]

**137.** On March 29, 1994 several LECs reported to the Common Carrier Bureau that the OBF had under consideration proposals for resolving ordering and billing procedures for split billing arrangements and the associated responsibilities including "percent of interstate use" (PIU) reporting.[263] The OBF apparently has not yet reached consensus on the resolution to these issues.

**138.** AT&T Transmittal No. 6788. Prior to the restructure, end-users that purchased AT&T private line service used LEC Feature Group A and B transport service to obtain access to AT&T POPs. Under the equal charge rate structure, the LECs billed such end-users per-minute charges for the Feature Group A and B services. Since the transport restructure tariffs took effect, many LECs have billed AT&T for the flat-rated portions of Feature Group A and B transport service, and have billed the Feature Group A and B end-users

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[261] *Tariff Order*, 9 FCC Rcd at 426, ¶ 70.

[262] *Tariff Order*, 9 FCC Rcd at 426-27, ¶¶ 71-72.

[263] *See, e.g.*, Letter from Kenneth Rust, NYNEX, to Gregory J. Vogt, Chief, Tariff Division, FCC (dated March 29, 1994); Letter from Gordon Maxson, GTE, to A. Richard Metzger, Acting Chief, Common Carrier Bureau, FCC (dated March 29, 1994); Letter from Michael J. Shortly, Jr., Rochester Telephone, to Gregory J. Vogt, Chief, Tariff Division, FCC (dated March 29, 1994). The IXC customer of record for a transport facility is responsible for reporting its PIU to the LEC so that appropriate bills may be rendered. IXCs who wish to resell capacity over their high-capacity entrance facilities to other carriers sought split billing for multiple carriers of record so that the IXC reselling the capacity would not have to take responsibility for the PIU estimates of its IXC customers. *See Ex Parte* Letter to Gregory J. Vogt, Chief, Tariff Division from Karis A. Hastings, Counsel for WilTel, dated December 10, 1993.

only for usage sensitive transport rate elements. In response to this practice, AT&T filed Transmittal No. 6788, by which AT&T proposed to amend its private line Tariff F.C.C. Nos. 9 and 11 to bill end-users for "Feature Group A (FG A) and Feature Group B (FG B) Connections which provide the physical connection between a Local Exchange Company End Office Switch and the AT&T Central Office, for connection to AT&T Private Line Services." In Transmittal 6788, in conjunction with the interexchange private line portion of Feature Group A and B service that AT&T already provides, AT&T proposed to resell the trunking facilities linking the AT&T POP to the dial tone office that contains the LEC switch at which a Feature Group A or B customer's private line terminates.

**139.** On August 12, 1994, the Common Carrier Bureau suspended Transmittal 6788 for five months, imposed an accounting order, and instituted an investigation into the reasonableness of the tariff revisions.[264] The *Suspension Order* noted that, since the transport restructure tariffs took effect, the LECs have continued billing the end-user customer for the usage-rated transport elements of Feature Group A and B. Further, many LECs have not offered to split the charges for the flat-rated facilities between AT&T's POP and the LEC dial tone office among these customers so that an end-user customer would pay only a pro rata share of the entrance facility rate for its use of a high-capacity facility.

**140.** The LECs have asserted that billing the IXC at whose POP the facilities terminate is consistent with the *First Transport Order* and with principles of cost-causation. According to the LECs, AT&T should be considered the ordering customer for the dedicated facilities because AT&T specified the interface level and because the facilities are dedicated to its use.[265] They are reluctant to bill end-users for the high-capacity entrance facilities running to AT&T POPs as if they were stand-alone voice-grade facilities. Such LECs fear that a LEC offering stand-alone voice-grade facilities would have to absorb the costs of any shared channels on the high-capacity facilities that are not sold to end-users or other customers. If the LEC bills a single IXC for the full cost of the facilities, however, the IXC, not the LEC, absorbs the cost of the channels not in use.[266]

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[264] *AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788*, Memorandum Opinion and Order, 9 FCC Rcd 4480 (Com. Car. Bur. 1994)(*Suspension Order*). *See also In the Matter of AT&T Communications Tariff F.C.C. Nos. 9 and 11, Order Designating Issues for Investigation*, DA 94-1118 (Com. Car. Bur. released October 7, 1994).

[265] *Suspension Order*, 9 FCC Rcd at 4482, ¶ 11. *See* Letter from Jo Ann Goddard, Pacific Bell, to Gregory J. Vogt, Chief, Tariff Division, FCC (dated May 4, 1994); Letter from Kenneth Rust, NYNEX, to William F. Caton, Acting Secretary, FCC (dated May 4, 1994).

[266] *Suspension Order*, 9 FCC Rcd at 4481, ¶ 9.

### 3. Discussion

**141.** Proposed rule. The *Tariff Order* correctly observed that, through LEC split billing and shared network arrangements, customers can reap the maximum benefit from the restructured transport rates. LEC split billing would help smaller IXCs reduce their access costs by enabling them to resell the services of other IXCs or by utilizing network sharing arrangements with other carriers to transmit and terminate interstate calls. It could also solve the practical billing problems that have arisen regarding Feature Group A and B access services.[267] Finally, split billing could permit more efficient deployment and use of transport facilities, a primary goal of the transport restructure. We therefore tentatively conclude that split billing for transport service is in the public interest. We further tentatively conclude that we should require the LECs to include in their tariffs procedures for offering transport split billing. We seek comment on these conclusions.

**142.** Implementation. As the record on this issue indicates, the parties strongly disagree on how best to implement split billing. We note that, although the OBF has made progress, it has not yet been able to reach final closure on an access charge split billing prototype after 11 months of consideration. We therefore seek comment on how best to implement the proposed split billing requirement.

**143.** First, we seek comment on a proposal offered by CompTel in the transport tariff review proceeding.[268] CompTel urges the Commission to adopt the following affirmative steps to make resale and sharing feasible: (1) require the LECS to permit switched and special access facilities to be combined at the customer POP, LEC serving wire centers, or any other designated hubbing locations; (2) require the LECs to permit multiple carriers of record for DS3 and DS1 entrance and interoffice facilities; (3) require the LECs to offer "split billing" for multiplexing equipment located at a hub; and (4) require the LECs to permit the IXC to specify (i) the type and grade of switched access service as well as the code at the terminating hub, and (ii) the customer premises location associated with special access channels. We seek comment on whether we should adopt any of these proposed requirements.

**144.** Second, we seek comment on whether a split billing charge levied on multiple customers of record using a single high-capacity facility should be set to recover the cost of unused as well as used capacity. For example, should a LEC be allowed to charge an end-user customer for its use of a high-capacity facility at a rate computed by dividing total flat charges for the entrance and interoffice facilities by the number of end-users whose traffic is carried over that facility, with a pro rata allocation of the costs of unused capacity in that rate? Commenters should address the issue of which entity would be responsible for determining the allocation, the service design and capability and the circuit facility assignment under such an arrangement. In addition, commenters should discuss whether this form of split billing should be available to resellers of access service, or should be limited to customers seeking to share

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[267] For a description of the problem, see *supra* ¶¶ 138-140.

[268] *Tariff Order*, 9 FCC Rcd at 422; CompTel Petition at 35-36.

dedicated facilities for their own use. Commenters should also address methods to ensure that Feature Group A and B users are not double-billed for their use of the same facilities.[269]

**145.** In addition, we seek comment on whether the type of split billing and shared network arrangements offered by NYNEX and SW Bell adequately address customer needs for such arrangements.[270] We also invite parties to comment on whether similar or modified arrangements should be offered by all LECs. Commenters should specifically address whether the "host/secondary customer of record" arrangement, under which a single IXC serves as the "host" customer of record, and is responsible for service arrangement and control, would satisfy the access customers' needs for sharing and resale of dedicated transport facilities? Commenters should also discuss how such offerings could be expanded or improved to meet customer needs. Commenters advocating that there be a single, host customer of record for the access service should specifically discuss how this split billing arrangement would apply to voice-grade access for Feature Group A and B services.

**146.** Finally, we seek comment on any other form of split billing that commenters believe would achieve the goals we have identified. Of particular interest would be any split billing prototype under consideration by the industry's OBF. Commenters who do not support a requirement that the LECs include in their tariffs procedures for offering split billing and shared network configurations should discuss alternative ways to satisfy LEC provision of these arrangements.

#### 4. Conclusion

**147.** For the reasons stated above, we tentatively conclude that a requirement that LECs offer split billing for transport service is in the public interest. We further tentatively conclude that we should require the LECs to include in their tariffs procedures for offering transport split billing. We seek comment on these conclusions, and on the options for implementation of the proposed requirement described in paragraphs 142-146.

### B. Procedural Matters

#### 1. Ex Parte

**148.** This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine period, provided they are disclosed as provided in the Commission's rules. See generally, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

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[269] *See supra* ¶ 139.

[270] *See supra* ¶¶ 132-133.

### 2. Regulatory Flexibility Act

**149.** We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate transport services directly subject to the proposed rule amendment do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure that the special circumstances of the smaller LECs are carefully considered in resolving those issues. The Secretary shall send a copy of this Supplemental Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub.L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

### 3. Notice and Comment Provision

**150.** Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before February 1, 1995 and reply comments on or before February 16, 1995. To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting comments. Parties wanting each Commissioner to receive a personal copy of their comments must file an original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202/857-3800). Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. For further information regarding this Supplemental Notice of Proposed Rulemaking, contact Barbara Esbin, (202) 418-1520 of the Common Carrier Bureau, Tariff Division.

## V. ORDERING CLAUSES

**151.** ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-205, 218, 220, 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, 220, 403, and 405, that the petitions for reconsideration and clarification concerning the rate structure and pricing of local transport ARE DENIED, except to the extent indicated herein.

**152.** IT IS FURTHER ORDERED that the decisions and policies adopted herein SHALL BE EFFECTIVE thirty days after the date of publication in the Federal Register.

**153.** IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i) and (j), 201-205, 218, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, and 403, that NOTICE IS HEREBY GIVEN of the proposed changes in our policies regarding split billing, and COMMENT IS INVITED on these proposals.

**154.** IT IS FURTHER ORDERED that WilTel's Motion for Acceptance of Late-Filed Opposition to Petition for Reconsideration IS GRANTED.

**155.** IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, as set forth *supra* in ¶¶ 32, 90.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## Appendix A: List of Parties

### I. Reconsideration of the *First Transport Order*

Parties filing Petitions for Reconsideration of
the First Transport Order, December 21, 1992
(First Order Petitions):

American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Bell Atlantic telephone companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
Cincinnati Bell Telephone Company (Cincinnati Bell)
Competitive Telecommunications Association (CompTel)
GTE Service Corporation and its affiliated domestic telephone operating companies (GTE)
Great Plains Communications, Inc. (Great Plains)
MCI Telecommunications Corporation (MCI)
Minnesota Equal Access Network Services, Inc. (MEANS)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell (Pacific)
Rochester Telephone Corporation (Rochester)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SW Bell)
Sprint Communications Company (Sprint)
US West Communications, Inc. (US West)
United States Telephone Association (USTA)
United Telephone Companies (United)
WilTel, Inc. (WilTel)

Parties filing Comments on, or Oppositions to,
First Order Petitions, February 12, 1993
(First Order Oppositions):

Ad Hoc Telecommunications Users Committee (Ad Hoc) (filed February 16, 1993)
Allnet Communication Services, Inc. (Allnet)
Ameritech
AT&T
Bell Atlantic
BellSouth
CompTel
GTE
MCI
MFS Communications Company, Inc. (MFS)
NYNEX
Pacific Bell and Nevada Bell (Pacific)
Rochester (filed February 1, 1993)
Sprint
SW Bell
United
US West
USTA
WilTel

Parties Filing Replies to First Order Oppositions,
February 25, 1993 (First Order Replies):

Ameritech
AT&T
Bell Atlantic
BellSouth
CompTel
GTE
MCI
MFS
MEANS
NYNEX
Pacific (filed Feb. 22, 1993)
Rochester
Sprint
SW Bell
United
US West
USTA
WilTel

## II. Reconsideration of the *First Reconsideration Order*

Parties filing Petitions for Reconsideration of
the First Reconsideration Order,
September 2, 1993 (First Recon. Petitions):

Sprint
SW Bell

Parties filing Comments on, or Oppositions to,
First Recon. Petitions, October 22, 1993
(First Recon. Comments):

Ameritech
AT&T
Bell Atlantic
CompTel
GTE
NYNEX
MCI (separate filings for SW Bell and Sprint)
SW Bell (filed September 17, 1993)
USTA
U S West
WilTel (filed October 26, 1993)

Parties filing Responses to First Recon. Oppositions,
November 4, 1993 (First Recon. Replies):

MCI
NYNEX
Sprint
SW Bell
U S West

## III. Reconsideration of the *Second Transport Order*

Parties filing Petitions for Reconsideration of the Second Transport Order, April 4, 1994 (Second Order Petitions):

CompTel
Sprint
WilTel

Parties filing Comments on, or Oppositions to, Second Order Petitions, May 3, 1994 (Second Order Oppositions):

Ameritech
AT&T
Bell Atlantic
BellSouth
GTE
MEANS
NYNEX
Rochester
SW Bell
USTA
U S West

Parties filing Replies to Second Order Oppositions, May 18, 1994 (Second Order Replies):

CompTel
SW Bell
Sprint
WilTel

## Appendix B: Impact Data

During the course of this proceeding, the Commission has collected from the Bell Operating Companies (BOCs) and GTE estimates and actual data on the impact of the transport restructure on large, medium, and small IXCs. This appendix describes the derivation of those impact data.

### BOC and GTE Estimates

Prior to the Commission's adoption of the *First Transport Order*, the BOCs and GTE submitted model results that estimated the impact of the transport restructure on large, medium, and small IXCs under a variety of assumed transport rate structures and pricing options. These models were designed to compare, for each category of IXC, the level of interstate switched access costs under the equal charge rule with the level of such costs under alternative rate structure and pricing plans. Estimates of the percentage change in total interstate switched access costs, as well as the percentage change in transport costs, were calculated and placed in the record.

The LEC models addressed facility demand both based on existing facility demand, and based on projected facility demand taking into account IXC reconfigurations in response to the restructure. The LECs used two different modelling approaches to project reconfigurations in response to the restructure -- one based on engineering principles and the other based on least-cost routing assumptions. The Commission determined that the LEC models using existing facility demand, other than that of Pacific, provided a reasonable estimate of the impact of the adopted rate structure and pricing plan on IXCs, at least when those estimates were based on existing network configurations. The Pacific model was deemed to be inadequate because it did not account for the entire geographic region, or for all the IXCs, served by Pacific.[1] None of the models based on projected demand after reconfigurations was deemed sufficiently reliable.

The BOCs and GTE submitted updated estimates in the fall of 1993 after the Commission's adoption of the *First Reconsideration Order*. These estimates accounted for the modifications made in the *First Reconsideration Order*. They were based on the same modelling methodology and assumptions that were used to derive the earlier impact estimates, except that they were updated to reflect: (1) customers' existing network configurations; (2) the decisions in the *First Reconsideration Order*; (3) the decision on general support facilities cost reallocation;[2] and (4) the effects of the adjustment of the price cap index for 1993.[3]

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[1] *See First Transport Order*, 7 FCC Rcd at 7085-98, Appendix C, for a more extensive description of these modelling approaches and an analysis of their reliability.

[2] *Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order, 8 FCC Rcd 3697 (1993).

[3] *First Reconsideration Order*, 8 FCC Rcd at 5381, ¶ 65.

## Quarterly Monitoring Reports

On December 29, 1993, the Common Carrier Bureau directed the BOCs and GTE to provide quarterly reports for 1994 containing information to assist the Commission in monitoring the effect of the transport restructure on IXCs.[4] After discussions with all interested parties, the Bureau accepted a revised data set and filing format proposed by the LECs.[5]

The quarterly reports provided the percentage changes in transport revenues from recurring charges and total interstate switched access revenues from recurring charges, broken down by large, medium, and small IXCs. These percentage changes were measured in two ways: (1) comparing present quarterly revenues with the revenues of the preceding quarter (*i.e.*, the first quarter of 1994 compared with the last quarter of 1993); and (2) comparing present quarterly revenues with the revenues of the same quarter of 1993 (*i.e.*, the second quarter of 1994 compared with the second quarter of 1993). The percentage changes in both the switched access costs and switched transport costs were presented based on actual revenues, as well as adjusted to remove the effects of demand variations and any rate changes between the compared quarters.

The report for the first quarter of 1994 was slightly modified to avoid use of January revenues that reflected December 1993 usage. Therefore, the 1994 first quarter revenue totals were comprised of revenues from flat-rated facilities during January through March 1994 and usage revenues during February through April 1994. When comparing first quarter 1994 revenues with first quarter 1993 revenues, February through April 1993 billed data were used.

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[4] *See* Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donna M. Hermerding, Ameritech Services, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Bell Atlantic, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to BellSouth Communications, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to GTE, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to NYNEX Telephone Companies, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Southwestern Bell, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Pacific Telesis, dated December 29, 1993; Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to U S West, dated December 29, 1993.

[5] Memorandum from Joseph Mulieri, Bell Atlantic, on behalf of BOCs/GTE to Policy and Program Planning Division, Common Carrier Bureau, dated April 13, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to William Blase, Jr., Southwestern Bell, dated May 16, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to Donna Hermerding, Ameritech Services, dated May 16, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to Michael McCullough, Bell Atlantic, dated May 16, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to NYNEX Government Affairs, dated May 16, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to Everett Williams, GTE, dated May 16, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to Robert Jackson, U S West, dated May 16, 1994; Letter from Kathleen B. Levitz, Deputy Chief, Common Carrier Bureau, to Al Swan, Pacific Telesis, dated May 16, 1994; Letter from A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, to R.W. Fleming, BellSouth, dated May 16, 1994.

The reports also contained growth in minutes by category of IXC, as well as the total number of local switching minutes of use for each LEC per quarter. These switched minutes were used to weight the impacts reported by each LEC in calculating an industry average impact, which is set forth in Table 1 of the attached order. Finally, the reports included other information tracking the course of the restructure.

**Quarterly Monitoring Reports - LEC Filings**

First Quarter:

Letters from Donna Hermerding and Cronan O'Connell, Ameritech, to William Caton, Acting Secretary, FCC, filed June 2 and June 23, June 30, 1994.
Letters from Joseph Mulieri, Bell Atlantic, to William Caton, Acting Secretary, FCC, filed May 31 and June 7, 1994.
Letters from Whit Jordan, BellSouth, to William Caton, Acting Secretary, FCC, filed May 31 and June 10, 1994.
Letters from Everett Williams and F. Gordon Maxson, GTE, to William Caton, Acting Secretary, FCC, filed May 31, June 9, and June 17, June 28, 1994.
Letters from Kenneth Rust and Alan Cort, NYNEX, to William Caton, Acting Secretary, FCC, filed May 31 and June 15, 1994.
Letters from Jo Ann Goddard, Pacific Telesis, to William Caton, Acting Secretary, FCC, filed May 31, June 2, June 7, and June 14, 1994.
Letter from William Blase, Southwestern Bell, to William Caton, Acting Secretary, FCC, filed May 31, 1994.
Letters from Cyndie Eby, U S West, to William Caton, Acting Secretary, FCC, filed May 31 and June 14, 1994.

Second Quarter:

Letter from Cronan O'Connell, Ameritech, to William Caton, Acting Secretary, FCC, filed July 29, 1994.
Letter from Joseph Mulieri, Bell Atlantic, to William Caton, Acting Secretary, FCC, filed August 5, 1994.
Letter from Whit Jordan, BellSouth to William Caton, Acting Secretary, FCC, filed July 29, 1994.
Letters from Jack Isbell, GTE, to William Caton, Acting Secretary, FCC, filed July 29 and August 11, 1994.
Letter from Kenneth Rust, NYNEX, to William Caton, Acting Secretary, FCC, filed August 1, 1994.
Letter from Jo Ann Goddard, Pacific Telesis, to William Caton, Acting Secretary, FCC, filed July 29, 1994.
Letter from Sandra Wagner, Southwestern Bell, to William Caton, Acting Secretary, FCC, filed July 29, 1994.
Letter from Cyndie Eby, U S West, to William Caton, Acting Secretary, FCC, filed August 1, 1994.

Industry Roll-up:

Letter from Joseph Mulieri, Bell Atlantic, to William Caton, Acting Secretary, FCC, filed October 18, 1994.
Letter from Joseph Mulieri, Bell Atlantic, to William Caton, Acting Secretary, FCC, filed November 14, 1994.

Third Quarter:

Letter from Cronan O'Connell, Ameritech, to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letter from Joseph Mulieri, Bell Atlantic, to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letter from Whit Jordan, BellSouth to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letters from F. Gordon Maxson, GTE, to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letter from Kenneth Rust, NYNEX, to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letter from Jo Ann Goddard, Pacific Telesis, to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letter from Sandra Wagner, Southwestern Bell, to William Caton, Acting Secretary, FCC, filed October 31, 1994.
Letter from Cyndie Eby, U S West, to Richard Metzger, Jr., Deputy Chief of Operations, Common Carrier Bureau, filed October 31, 1994.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-326
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Cable | ) | MM Docket No. 92-265 |
| Television Consumer Protection | ) | |
| and Competition Act of 1992 | ) | |
| | ) | |
| Development of Competition and | ) | |
| Diversity in Video Programming | ) | |
| Distribution and Carriage | ) | |

# MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: December 15, 1994 Released: December 23, 1994

By the Commission: Chairman Hundt not participating.

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## I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider a petition for

reconsideration of our *First Report and Order*[1] and the rule implementing Section 628(c)(2)(C) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] filed by the National Rural Telecommunications Cooperative ("NRTC").

2. The 1992 Cable Act amended the Communications Act of 1934, in part, by adding a new Section 628. Section 628 is intended to foster the development of competition to traditional cable systems by providing greater access by competing multichannel systems to cable programming services. Specifically, Section 628(b) states that:

> it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[3]

3. Section 628(c) directs the Commission to adopt regulations that specify particular conduct that is prohibited by Section 628(b). At a minimum, the regulations must:

> (A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;
>
> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from---
>
> (i) imposing reasonable requirements for creditworthiness, offering of

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[1] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992-- Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order*, 8 FCC Rcd 3359 (1993) (*"First Report & Order"*).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 47 U.S.C. § 548(b).

service, and financial stability and standards regarding character and technical quality;

(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

(iv) entering into an exclusive contract that is permitted under subparagraph (D);

(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.[4]

4. Pursuant to that mandate, the Commission adopted its *First Report and Order*, which set forth the program access rules and procedures to implement those statutory provisions. With respect to the specific prohibition contained in Section 628(c)(2)(C), the Commission adopted Section 76.1002(c)(1), which states:

> No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable

[4] 47 U.S.C. § 548(c)(2).

programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.[5]

5. NRTC filed a petition for reconsideration of the *First Report & Order*, requesting that the Commission amend Section 76.1002(c)(1) to include within its prohibition for areas unserved by cable, exclusive contracts for the distribution of programming between direct broadcast satellite ("DBS") distributors and vertically integrated satellite cable programming vendors. United States Satellite Broadcasting, Inc. ("USSB"), Time Warner Entertainment Company, L.P. ("Time Warner"), Viacom International, Inc. ("Viacom"), Discovery Communications, Inc. ("Discovery"), and Liberty Media Corporation ("Liberty Media") opposed this petition. NRTC and DirecTV, Inc. ("DirecTV") filed replies. After the close of the pleading cycle, NRTC,[6] USSB, DirecTV, Viacom and Home Box Office, Inc. ("HBO") filed *ex parte* pleadings.[7]

6. For the reasons discussed below, we deny NRTC's petition and decline to amend Section 76.1002(c)(1). We conclude that our current interpretation of Section 628(c)(2)(C) is the most reasonable one.

## II. BACKGROUND

7. The 1992 Cable Act and its legislative history indicate that Congress was concerned with expanding the availability of programming and eliminating unjustified discrimination in the price charged to non-cable technologies.[8] Congress noted that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable

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[5] 47 C.F.R. § 76.1002(c)(1).

[6] In addition, more than one hundred members and affiliates of NRTC submitted letters in support of NRTC's comments.

[7] NRTC, USSB, DirecTV, Viacom and HBO made the same arguments in their comments and reply comments to the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, CS Docket 94-48, 9 FCC Rcd 2896 (1994).

[8] 1992 Cable Act, §§ 2, 19, Communications Act § 628, 47 U.S.C. § 548; House Comm. on Energy and Commerce, H.R. Rep. No. 102-862, ("Conference Report") 102d Cong., 2d Sess. at 93 (1992); Senate Comm. on Commerce, Science and Transportation, S. Conf. Rep. No. 102-92, ("Senate Report"), 102d Cong., 1st Sess. at 23-29 (1991); House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, ("House Report") 102d Cong., 2d Sess. at 165-68 (1992); 138 Cong. Rec. H6487-6571 (daily ed. July 23, 1992).

operators over other multichannel video programming distributors ("MVPDs").[9] Thus, Congress concluded that program access provisions targeted at breaking the "stranglehold" over programming created by those vertical relationships in the cable industry would lead to a more balanced competitive environment in the multichannel video programming marketplace.[10] Direct broadcast satellites were among the technologies that were to be fostered through the program access provisions of the 1992 Cable Act.[11]

8. As background on the DBS industry, the first DBS satellite ("DBS-1") was launched in December 1993; it is co-owned and jointly operated by Hughes Communications Galaxy, Inc., (whose affiliated company, DirecTV, is the DBS provider) and USSB, which is owned by Hubbard Broadcasting, Inc.[12] The satellite is situated at the 101° West Longitude orbital position.[13] DirecTV owns eleven of the sixteen transponders on DBS-1 and USSB owns the remaining five.[14] On June 17, 1994, DirecTV and USSB began providing DBS service. Currently, DirecTV offers 150 channels and USSB offers 20 channels.[15] As of June 17, 1994, DBS service was available throughout the entire continental United States.[16] At present, DirecTV and USSB are the only entities offering high-power Ku-band (small dish) DBS service in the United States, although several other parties hold construction permits for

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[9] 1992 Cable Act, § 2(a)(5).

[10] *See* 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(statement of Rep. Eckart in support of the Tauzin amendment).

[11] House Report at 165-66 (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

[12] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* in CS Docket 94-48, (*"First Competition Report"*), FCC 94-235, released September 28, 1994, at ¶63; *Ex Parte* Reply of USSB ("USSB Second *Ex Parte*"), filed September 2, 1994 at n.1; DirecTV Reply, Attachment A at 7.

[13] *United States Satellite Broadcasting Company, Inc. and Hughes Communications Galaxy, Inc.*, 7 FCC Rcd 7247, 7251 (1992).

[14] *Id.*

[15] *First Competition Report* at ¶ 63. Both DirecTV and USSB represent that with signal compression and improvements in encoder equipment, as well as the August 3, 1994 launch of DirecTV's DBS-2, soon each will be offering more channels. *Id.* at ¶¶ 63-64.

[16] USSB Second *Ex Parte* at 1 n. 1.

other orbital locations.[17]

9. NRTC is a non-profit corporation, owned and controlled by over 500 rural electric cooperatives and over 200 rural telephone systems throughout 49 states.[18] NRTC assists its member companies in meeting telecommunications needs of rural consumers, through the marketing of "C-band" (low power, large dish) satellite delivered video programming.[19] NRTC entered into a DBS distribution agreement with DirecTV that grants NRTC exclusive rights to market DirecTV programming to rural subscribers.[20] The agreement also requires DirecTV to obtain certain programming on behalf of NRTC.[21]

10. USSB entered into exclusive distribution agreements with Viacom and Time Warner to carry HBO and Showtime, respectively. Both Viacom and Time Warner are vertically integrated satellite cable programming vendors. USSB's agreements with HBO and Viacom give USSB exclusive rights to the programming only with respect to DBS distributors at the 101° West Longitude orbital location.[22] The agreements do not restrict access to the programming by multichannel multipoint distribution services ("MMDS"), satellite master antenna television ("SMATV"), or C-band satellite distributors, and the

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[17] *See Continental Satellite Corporation*, 4 FCC Rcd 6292, 6300-01 (1989)(granting eight construction permits, including USSB and Hughes); *Tempo Satellite, Inc.*, 7 FCC Rcd 2728, 2732 (1992). *See also,* Assignments of orbital positions: *Echostar Satellite Corporation*, 7 FCC Rcd 1765, 1770 (1992); *Advanced Communications Corporation*, 6 FCC Rcd 2269, 2272, 2274 (1991); *Directsat Corporation*, 8 FCC Rcd 7962, 7964 (1993); *Direct Broadcast Satellite Corporation*, 8 FCC Rcd 7959, 7961 (1993).

[18] NRTC Petition for Reconsideration ("Petition"), filed June 10, 1993, at 2.

[19] *Id.* at 2-3.

[20] *Id.* at 3.

[21] NRTC First *Ex Parte* Presentation ("NRTC First *Ex Parte*"), filed November 19, 1993, at 2.

[22] The DBS-1 satellite at the 101° West Longitude location can deliver a signal to the entire continental United States ("full-CONUS"). Under international treaties and agreements, the United States is assigned eight orbital locations for high-power DBS satellites. These eight orbital locations are divided between eastern locations which provide signals to the eastern half of the continental United States ("half-CONUS") and western locations which provide signals to the western half-CONUS. Three of the four eastern orbital locations (101° West Longitude, 110° West Longitude, and 119° West Longitude) can also deliver a full-CONUS signal. The fourth eastern orbital location, 61.5° West Longitude, may not be able to deliver an adequate full-CONUS signal.

agreements do not restrict access by any DBS distributor at any other orbital location.[23]

## III. SUMMARY OF PLEADINGS

11. NRTC contends that the Commission incorrectly interpreted Section 628(c)(2)(C) by promulgating a rule that limits the *per se* prohibition against exclusive arrangements in areas unserved by cable operators to those exclusive agreements between cable operators and vertically integrated satellite cable programming vendors (and satellite broadcast programming vendors).[24] NRTC argues that Congress did not intend to limit Section 628(c)(2)(C) only to exclusive agreements with cable operators but rather to exclusive agreements with any MVPD. NRTC states that by limiting the reach of the Section to cable operators, the Commission's rule thwarts the purposes of Section 628 to increase competition, diversity and availability of programming to persons in rural and other currently unserved areas.[25] NRTC states that Congress intended to cover any activity of vertically integrated satellite cable programming vendors (including cable operators), as well as satellite broadcast programming vendors, that prevents an MVPD from obtaining programming in areas unserved by cable. NRTC petitions the Commission to amend Section 76.1002(c)(1) to reflect a *per se* prohibition on any practices, understandings, arrangements and activities that involve a cable operator, satellite cable programming vendor, or satellite broadcast programming vendor that prevent an MVPD from obtaining programming from a vendor affiliated with a cable operator.

12. NRTC's request is premised upon a statutory construction of the following phrase in Section 628(c)(2)(C): "including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor." NRTC contends that the use of the word "including" by Congress was meant to enlarge, not limit, the list that precedes it.[26] Thus, under the interpretation advanced by NRTC, Section 628(c)(2)(C) would read as follows:

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[23] Home Box Office *Ex Parte* Response to *Ex Parte* Presentation of the NRTC ("HBO *Ex Parte*"), filed April 15, 1994, at 8-9; Viacom *Ex Parte* Response ("Viacom *Ex Parte*"), filed July 14, 1994, at 6 n. 5.

[24] Petition at 11.

[25] *Id.* at 11-12.

[26] Second *Ex Parte* Presentation by NRTC ("NRTC Second *Ex Parte*"), filed March 4, 1994, at 11-12 (citing *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *American Fed. of Television & Radio Artists v. NLRB*, 462 F.2d 887, 890-91 (D.C. Cir. 1972); *Exxon Corp. v. Lujan*, 730 F. Supp. 1535 (D. Wyo. 1990)).

> prohibit practices, understandings, arrangements, and activities, . . . , that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section.

NRTC further contends that the legislative history shows that Congress was concerned about cable operators' control over programming in addition to the behavior of cable operators themselves.[27] NRTC also states that its interpretation is consistent with Section 628(c)(2)(D), which specifically prohibits in served areas only exclusive contracts with cable operators. In contrast, Section 628(c)(2)(C) prohibits all exclusive contracts in unserved areas.[28]

13. NRTC also argues that restricting the application of Section 628(c)(2)(C) to the conduct of cable operators would create a loophole in the 1992 Cable Act by allowing satellite cable programming vendors to favor certain MVPDs, and to prevent others from obtaining the programming. NRTC argues that this will result in a restriction to competition and diversity in rural markets.

14. NRTC uses the Primestar Partners, L.P. ("*Primestar*") antitrust litigation as an example of how vertically integrated programming vendors tried unsuccessfully to block the distribution of programming to potential competitors of Primestar. NRTC argues that the behavior at issue in *Primestar* currently is allowable under Section 76.1002(c)(1), because the conduct does not involve a "cable operator." Primestar is a fixed satellite service Ku-band operator owned and formed by six cable multiple system operators ("MSOs") to provide medium-power DBS service.[29] In June 1993, the U.S. Department of Justice ("DOJ") and the attorneys general ("AGs") of 40 states commenced federal antitrust actions against Primestar alleging the existence of anticompetitive restrictions on cable programming access by distributors that compete with the cable MSOs. The DOJ and AGs entered into consent decrees with the six cable MSOs.[30] The decrees restrict the ability of the MSOs to enter into

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[27] *Id.* at 14-20.

[28] *Id.* at 9-10.

[29] The six MSOs are Comcast Corporation, Continental Cablevision, Inc., Cox Enterprises, Inc., Newhouse Broadcasting Corporation, Tele-Communications, Inc., and Time Warner, Inc.

[30] *United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994) ("DOJ Final Decree"); *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993) ("AG Final Decree"). Viacom, an original investor in Primestar, entered into a separate consent decree with the AGs. *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶ 70,404 (S.D.N.Y. 1993)

exclusive contracts or to otherwise restrict the sale of programming to competitors of the cable MSOs.[31] The decrees allow Primestar to deal only with one high-power DBS provider at the 101° West Longitude orbital location, and further provide that any agreements made with high-power DBS providers at any other orbital location be made on terms that are as favorable as those agreed to with the first DBS provider at the 101° West Longitude location.[32]

15. Finally, NRTC contends that, because of USSB's exclusive contracts for HBO and Showtime, NRTC has been precluded from obtaining these programming services. NRTC also contends that USSB's arrangement for HBO and Showtime sets a baseline price for that programming, below which no DBS provider can obtain such programming.[33]

16. DirecTV supports NRTC's petition, but contends that the Commission should confine its reconsideration to the proper scope of Section 628(c)(2)(C). DirecTV agrees with NRTC's position that the plain language of Section 628(c)(2)(C) supports a broader interpretation than that contained in Section 76.1002(c)(1).[34] In addition, DirecTV argues

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("Viacom Final Decree").

[31] The DOJ Final Decree prohibits for a period of five years the enforcement of existing or future exclusive programming contracts between programming services controlled by the MSOs and cable systems controlled by the MSOs. Under this decree, the MSOs cannot restrict or limit the sale of cable programming to DBS providers and other non-affiliated cable operators. In addition, the MSOs cannot engage in retaliatory conduct against programmers who sell programming to non-affiliated distributors. The AGs Final Decree prohibits enforcement of any existing contracts that restrict the sale of programming to DBS providers. Under this decree the MSO defendants may enforce existing exclusive contracts disclosed to the court, except that such agreements cannot be renewed nor can they apply to DBS providers. Finally, the AGs Final Decree allows programming vendors controlled by the MSOs to enter into exclusive contracts with a DBS provider, subject to three conditions. First, the DBS provider cannot be controlled by owners of cable systems accounting for more than 20% of all cable subscribers; second, the exclusivity cannot preclude the availability of such programming on other orbital locations; and third, the programming vendors controlled by the MSOs shall not require as a condition for dealing that it be the exclusive distributor of the DBS provider's programming services.

[32] AGs Final Decree § IV(A)(1)(g); Viacom Final Decree § IV(A)(1)(j), (j)(iii).

[33] First *Ex Parte* Presentation by NRTC ("NRTC First *Ex Parte*"), filed November 22, 1994, at 6.

[34] *Ex Parte* Response of DirecTV ("DirecTV *Ex Parte*"), filed May 26, 1994, at 2-3. USSB requests that the Commission strike DirecTV's *ex parte* filing as an untimely petition for reconsideration. USSB argues that DirecTV's request is much broader than NRTC's

that consumers eventually will pay more for a full complement of programming by piecing together program offerings from different DBS providers rather than obtaining a complete package from one provider, and that vertically integrated programmers can thereby fragment the market and weaken DBS competitors.[35] DirecTV argues that, at a minimum, the Commission should not make any broad policy decisions regarding the propriety of exclusive contracts between non-cable MVPDs and vertically integrated programming vendors that could prevent consideration of these contracts on a case-by-case basis under other provisions of Section 628.[36] DirecTV states that USSB's exclusive contracts violate Section 628(b)'s prohibition against unfair practices and Section 628(c)(2)(B)'s prohibition against non-price discrimination, i.e., unreasonable refusals to sell.[37]

17. USSB, Viacom, Time Warner, Liberty Media, HBO and Discovery filed oppositions contending that the Commission's rule is consistent with Section 628(c)(2)(C) and the purposes underlying the 1992 Cable Act. Opponents argue that the Commission has recognized the benefits of exclusive contracts generally and that the rationale for banning exclusive contracts with cable operators does not apply to exclusive contracts with DBS providers. Opponents argue that the latter contracts are pro-competitive. Time Warner contends that the Commission should not amend its rule unless it becomes evident through the complaint process under Section 628(b) that such contracts inhibit competition. [38]

18. Opponents also argue that the only exclusive contracts required to be prohibited under the 1992 Cable Act are those to which a cable operator is a party. Several opponents argue that NRTC's interpretation of Section 628(c)(2)(C) is contrary to the legislative history, particularly the Conference Report, which states that "the regulations required . . . prohibit exclusive contracts and other arrangements between a cable operator and a vendor which prevent a multichannel video programming distributor from obtaining

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request for reconsideration because DirecTV asks the Commission to declare that all exclusive contracts between vertically integrated programmers and non-cable MVPDs presumptively are disfavored. USSB Second *Ex Parte* at 24-26. We deny USSB's request to strike because we find that DirecTV's arguments are within the scope of NRTC's reconsideration request.

[35] DirecTV *Ex Parte* at 5.

[36] DirecTV Reply at 2-4.

[37] DirecTV *Ex Parte* at 5-6, 9. Likewise, Liberty Media states that remedies already exist where "NRTC or any other multichannel video programming distributor demonstrates that a particular agreement between a vertically-integrated programmer and a non-cable distributor regarding distribution to non-cabled areas involves the exercise of market power by the cable operator affiliated with that programmer." Liberty Media Opposition at 12.

[38] Time Warner Opposition at 7-8.

programming from a satellite cable programming vendor affiliated with a cable operator."[39] Opponents state that nothing in the 1992 Cable Act or its legislative history shows Congressional intent to ban exclusive agreements between vertically integrated programming vendors and non-cable technologies, such as DBS.[40] Viacom further argues that if Congress intended to make such contracts illegal it would have plainly stated that in Section 628(c)(2)(C).[41]

19. Opponents further argue that the canons of statutory construction require the Commission to look to the overall structure of the 1992 Cable Act in interpreting Section 628(c)(2)(C).[42] USSB and Viacom argue that when read together, Sections 628(c)(2)(C) and 628(c)(2)(D) demonstrate that Congress was concerned only with exclusive contracts between cable operators and programming vendors. Thus, Congress generally prohibited such contracts except in areas served by cable operators that met the public interest determination under Section 628(c)(2)(D). Moreover, Viacom argues, the interpretation given by NRTC and DirecTV would put cable operators in a more favorable position than other MVPDs because Section 628(c)(2)(D) permits cable operators, but not other MVPDs, to enter into certain exclusive contracts.[43] USSB states that, without considering the "including" clause of Section 628(c)(2)(C), the rest of the paragraph would not make sense because the programming at issue is described in that clause.[44] USSB also argues that the Commission cannot ignore unambiguous legislative history when a literal reading of the statute results in a restriction on competition between the two DBS providers and a waste of transponder space.[45]

20. Opponents further argue that Congress was concerned with the undue market power wielded by cable operators,[46] and therefore, the entire thrust of the 1992 Cable Act

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[39] Conference Report at 92, *cited in* Discovery Opposition at 5-6; USSB *Ex Parte* Response to *Ex Parte* Presentation of NRTC ("USSB First *Ex Parte*"), filed January 24, 1994, at 23; HBO *Ex Parte* at 4; Viacom *Ex Parte* at 15.

[40] Viacom Opposition at 5; HBO *Ex Parte* at 4-5; USSB First *Ex Parte* at 15 n. 10.

[41] Viacom Opposition at 4-5.

[42] Viacom *Ex Parte* at 18 n. 18; USSB Second *Ex Parte* at 10-13.

[43] Viacom *Ex Parte* at 20-21.

[44] USSB Second *Ex Parte* at 7-10.

[45] *Id.* at 10-12.

[46] USSB Opposition at 8; Liberty Media Opposition at 11; Viacom *Ex Parte* at 6 (citing 1992 Cable Act, § 2(a)(2)).

was to foster alternatives to cable, such as DBS, by requiring that vertically integrated programming vendors sell programming to non-cable technologies.[47] Liberty Media contends that the Commission recognized that Congress directed it to avoid placing unnecessary constraints on the video programming market, and that NRTC's expansive interpretation of Section 628(c)(2)(C) would be such a constraint.[48]

21. Viacom contends that DirecTV's suggestion that exclusive contracts with distributors other than cable operators may violate Sections 628(c)(2)(B) or 628(b) would render Section 628(c)(2)(C) superfluous. Viacom states that Congress did not consider the non-discrimination provision of Section 628(c)(2)(B) nor the "unfair practices" provision of Section 628(b) adequate to ban exclusive contracts between cable operators and affiliated vendors. Thus, Viacom argues, Congress specifically provided for their ban in Section 628(c)(2)(C). Moreover, Viacom argues that, Congress specifically did not provide for the ban of non-cable exclusive contracts in Section 628(c)(2)(C).[49] USSB also argues that Sections 628(b) and 628(c)(2)(B) do not prohibit exclusive contracts that are not covered by Section 628(c)(2)(C).[50]

22. Opponents contend that the Commission previously has recognized that exclusive contracts are generally acceptable.[51] Discovery argues that exclusive contracts in the sale of programming are pro-competitive because they allow one distributor to distinguish its service from that of another, eventually leading to a diversity of programming to consumers.[52] Viacom also contends that such contracts should be judged under a "rule of reason," i.e., an examination of whether in the particular circumstance the exclusive agreement would unreasonably foreclose access to a particular product or service, and any reasonable justifications for exclusivity.[53] Liberty Media also states that the Commission has recognized exclusivity as a legitimate competitive tool, except where such arrangements

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[47] USSB Opposition at 10-11.

[48] Liberty Media Opposition at 11 (citing *First Report & Order* in MM Docket 92-266 (Rate Regulation), 8 FCC Rcd 5631, 5640, ¶ 8 (1993)).

[49] Viacom Opposition at 8; Viacom *Ex Parte* at 19-20.

[50] USSB Second *Ex Parte* at 18-20.

[51] Viacom Opposition at 9 (citing *First Report & Order*, 8 FCC Rcd at 3384, ¶ 63); USSB Opposition at 12-13; Discovery Opposition at 6; Liberty Media Opposition at 11-12.

[52] Discovery Opposition at 6.

[53] Viacom Opposition at 9 (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949); *Beltone Electronics Corp.*, 100 F.T.C. 68, 197 (1982)).

further cable operators' exercise of market power.[54] USSB points out that its exclusive agreement only applies against its direct DBS competitor at the 101° West Longitude orbital location (DirecTV), and not against any other MVPD. USSB further states that Section 628(c)(2)(C) was not intended to guarantee every MVPD access to all programming services.[55]

23. USSB argues that the rationale for prohibiting an affiliated vendor from entering into an exclusive contract with a cable operator does not apply to the same programming vendor's exclusive contracts with DBS providers. USSB states that if a cable operator, who was the exclusive distributor of a cable programming service in a particular area, did not serve an area or sell the programming service to non-cable distributors, consumers would not receive the programming from any source. In contrast, USSB explains, the existence of an exclusive contract at one orbital location does not prevent consumers in areas unserved by a cable operator from receiving the programming service from a DBS provider. Rather, states USSB, its exclusive agreement does not result in a lack of DBS service to the consumer because all consumers can receive both USSB and DirecTV programming (or the full complement of DirecTV programming and solely HBO and Showtime from USSB) through the same receive equipment and system.[56] USSB contends that DBS providers cannot exercise the type of monopolistic power exercised by cable operators over video programming distribution facilities because there are two DBS providers (USSB and DirecTV) at the 101° West Longitude orbital location. In addition, USSB argues that either USSB or DirecTV could have had *de facto* exclusivity at the 101° West Longitude orbital location if one of them had been the only DBS provider at that location because this was permitted under the Commission's rules.[57] Viacom and USSB further argue that exclusivity prevents the waste of the spectrum through duplicate transmissions of programming from the same transponder.[58]

24. Discovery also argues that exclusive contracts between vertically integrated programming vendors and non-cable MVPDs do not have the preclusive effect in unserved areas that exists with exclusive contracts involving cable operators because the former type of contracts give consumers the ability to obtain the programming service, while enhancing

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[54] Liberty Media Opposition at 11-12.

[55] USSB Opposition at 14, 15 n.10.

[56] *Id.* at 16 & n.11.

[57] *Id.* at 20 n.13, (citing *Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, Report and Order,* 6 FCC Rcd 2581 (1991)).

[58] *Id.* at 18-20; Viacom Opposition at 10-11.

competition among distributors and diversity in programming.[59] HBO also contends that the agreement with USSB promotes consumer access because multiple retailers will sell HBO, and that the exclusivity applies only against USSB's competitor at the orbital slot, and not with respect to any other DBS or non-cable distributor.[60]

25. Viacom disputes DirecTV's contention that a consumer subscribing to both USSB's and DirecTV's services automatically will pay more than it would if it bought a package from one DBS distributor or cable operator. Viacom relies on evidence in the television receive-only market that shows that subscribers generally pay less in the aggregate to obtain programming from several distributors in contrast to a cable subscriber receiving a similar package.[61] USSB responds to NRTC's claim that USSB's exclusive contract allegedly sets the baseline price for the exclusive programming, stating that USSB is under no requirement to sell a product to its competitor at a price below USSB's cost and that all subscribers will have access to USSB's programming at competitive prices.[62]

26. Opponents further argue that because the DBS industry is a new and developing competitor to cable, DBS distributor exclusivity against another DBS distributor promotes the public interest because it gives strength to such competitors to compete.[63] USSB contends that placing unnecessary restrictions on the ability of DBS distributors to acquire and deliver programming will hinder their ability to compete effectively against cable. USSB further contends that the exclusive contracts at issue are necessary to enable it to compete with DirecTV, which controls more than five times the channel capacity of USSB.[64] Viacom likewise contends that the exclusive agreement with USSB will allow USSB to compete effectively against DirecTV, and thereby guarantee at least two DBS competitors at the 101° West Longitude orbital location.[65] Viacom further contends that in this particular context a *per se* rule will help only DirecTV, and not the DBS marketplace in

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[59] Discovery Opposition at 7.

[60] HBO *Ex Parte* at 7-9.

[61] Viacom *Ex Parte* at 8-9.

[62] USSB First *Ex Parte* at 20.

[63] USSB Opposition at 16-18; Viacom Opposition at 10. Viacom contends that even DirecTV has exclusive rights from several movie studios to exhibit first-run feature length theatrical films on a pay-per-view basis and from other programmers. Viacom further notes that NRTC has exclusive rights to provide DirecTV programming to the rural marketplace. Viacom Opposition at 11 n. 6.

[64] USSB First *Ex Parte* at 27.

[65] Viacom *Ex Parte* at 5-7.

general, because it would significantly weaken USSB's ability to compete against DirecTV.[66] Viacom states that this would result in a concentration of power over DBS by Hughes, a "monopoly in the sky" that could exert more power than even the largest cable operator.[67]

27. USSB disputes NRTC's claim that NRTC needs HBO and Showtime to attract subscribers because NRTC refused USSB's offer to provide its programming (including HBO and Showtime) to NRTC for distribution to its members on a non-exclusive basis.[68] Finally, HBO states that it has legitimate business reasons for entering into the contract with USSB. HBO states that it believes that USSB will better market all of HBO's services than would NRTC; HBO's agreement with USSB provides for multiple distributors in all geographic areas, in contrast with NRTC's exclusivity in rural areas; and USSB, and not NRTC, agreed to carry all feeds of HBO and Cinemax (also owned by Time Warner).[69]

28. Finally, with respect to *Primestar*, USSB argues that "it is unlikely that 40 states would have agreed to the provisions that recognize such exclusive contracts if any question existed whether the Cable Act prohibited such exclusive arrangements."[70] In reply, NRTC disputes USSB's use of the Primestar consent decrees as evidence of the legality of exclusive contracts. NRTC refers to the "savings clause" in the decrees which provides that the decrees do not supersede the 1992 Cable Act or the Commission's rules.[71] In any event, NRTC and DirecTV dispute the relevance of the Primestar proceeding in evaluating the legality of the contracts at issue.[72]

29. NRTC also replies that the Commission's rule does not reflect the *First Report and Order*, which provides that the implementing rule would prohibit vertically integrated programmers from engaging in activities that result in *de facto* exclusivity.[73] NRTC states that the Commission's wording of Section 76.1002(c)(1) is a drafting error. NRTC also argues that it makes little public policy sense to prohibit cable operators from entering into such exclusive arrangements, but allow cable programmers, such as Time Warner and

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[66] Viacom Opposition at 11-12.

[67] Viacom *Ex Parte* at 7-8.

[68] USSB First *Ex Parte* at 17 n.12

[69] HBO *Ex Parte* at 11-13.

[70] USSB Opposition at 6 n.6.

[71] NRTC First *Ex Parte* at 11; NRTC Reply, Attachments A and B.

[72] NRTC Second *Ex Parte* at 6-12; DirecTV *Ex Parte* at 16.

[73] NRTC Reply at 6 (citing *First Report & Order*, 8 FCC Rcd at 3383, ¶ 61).

Viacom, to do so.[74]

30. NRTC further argues that the USSB/Time Warner/Viacom agreement will permit the cable industry to "split" the DBS market, by "hobbling" the competitors, i.e., USSB will have the programming, but limited channel capacity, while DirecTV will have channel capacity but limited programming.[75] NRTC also states that it had legitimate business reasons to refuse USSB's proposal to obtain the services, and states that it should have the ability to obtain HBO and Showtime without having to become USSB's "sales agent."[76]

31. DirecTV replies that exclusivity specifically was disfavored by Congress in this context and, if allowed here, may ultimately be used to apply to all DBS providers at all orbital locations.[77] In response to HBO's argument regarding the limited nature of the USSB contracts, DirecTV argues that all other non-cable technologies may suffer discrimination and fragmentation through similar arrangements with vertically integrated cable programming vendors.[78] DirecTV contends that exclusive contracts will result in consumers dealing with multiple MVPDs to obtain the same programming package they could obtain from a single cable operator. DirecTV concludes that the DBS technology will provide competition to cable only when the services of USSB and DirecTV are combined.[79] DirecTV also contends that each MVPD is entitled to programming regardless of the duplication among competitors.[80] With respect to USSB's arguments that it needs exclusive contracts to compete against DirecTV's larger channel capacity, DirecTV argues that USSB's limited channel capacity was a voluntary business decision and should not provide the basis for a public policy decision.[81]

## IV. DISCUSSION

32. Because there are several possible interpretations of the statutory provisions

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[74] *Id.* at 3.

[75] NRTC First *Ex Parte* at 6.

[76] NRTC Second *Ex Parte* at 4-5.

[77] DirecTV *Ex Parte* at 18-20.

[78] DirecTV *Ex Parte* at 12.

[79] DirecTV *Ex Parte* at 17; DirecTV Reply at 8.

[80] DirecTV *Ex Parte* at 18.

[81] *Id.* at 14.

involved here (Sections 628(b) and (c)), to resolve this matter it is appropriate to rely on not just the language of the Act but also (i) a careful analysis of the structure of Section 628 of the 1992 Cable Act, (ii) its legislative history, and (iii) the underlying policy objectives of the 1992 Cable Act. This is the process that previously has been followed in implementing the provisions of the 1992 Cable Act and in developing a coherent set of rules for their enforcement.[82] Having made careful use of that process to assure that the various program access provisions of the 1992 Cable Act fit together in a coordinated fashion, failure to follow that course now could lead to anomalous results.

33. Based on a thorough review of these factors, we believe our initial interpretation of Section 628(c)(2)(C) of the 1992 Cable Act, as reflected in implementing rule Section 76.1002(c)(1), is reasonable and should stand. We believe that this interpretation is supported by the findings and policy set forth in the 1992 Cable Act and its legislative history and best fulfills the underlying purposes of the 1992 Cable Act -- to foster competition to traditional cable systems. We note, however, that in declining to broaden the scope of Section 76.1002(c)(1) -- to prohibit *per se* the exclusive DBS contracts at issue -- we do not preclude the petitioner or any other aggrieved party from seeking relief from such contracts through other appropriate provisions of the 1992 Cable Act. We further find that the *Primestar* proceedings have no relevance to the disposition of the issue before us. The *Primestar Final Judgment* specifically provides that the decrees do not preempt the 1992 Cable Act or the Commission's rules.[83] The basis for the Commission's decision is set forth

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[82] For example, in the *First Report and Order*, the Commission addressed the interpretation of two issues by reviewing the entire 1992 Cable Act, its legislative history and objectives. One issue was whether a finding of competitive harm was a necessary element of the conduct proscribed by Section 628(c). There the Commission concluded "either of two interpretations could be supported by the express language of the statute." *First Report and Order*, *supra*, at 3376, ¶ 46. The Commission determined that harm was not a required element for a complaint brought under Section 628(c). *Id.* at 3377, ¶ 49. The second issue was whether vertical integration referenced in Section 628 includes integration anywhere in the nation or only in the specific market where the competitive issue arises. *Id.* at 3369, ¶ 27. We determined that vertical integration in the specific market is not required. *Id.* at 3369, ¶ 27.

[83] *United States v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶¶ 70,403, 404 (S.D.N.Y. 1993). *See also*, Transcript of Hearing on Proposed Consent Decree, *State of New York ex rel. Abrams v. Primestar Partners*, No. 93-3868, at 22-23 (S.D.N.Y. Sept. 3, 1993) (presiding judge stating "there is nothing in this decree that binds the FCC in any way ... nor should any finding I make in approving this decree be taken ... as any imprimatur of approval or suggestion that the particular exclusive contracts are lawful or unlawful. That is a matter for the FCC and a matter as to which I would have to defer to the FCC"). Further, in its *Amicus Curiae Memorandum of Law*, the Commission specifically

below.

34. NRTC appears to be arguing that, notwithstanding the directive to the Commission to adopt implementing regulations, Section 628(c)(2)(C) is mandatory in its coverage and clear on its face. We are not persuaded that the Section is clear and unambiguous. Indeed, ambiguity exists when a statute is capable of being construed "by reasonably well-informed persons in two or more different senses."[84] NRTC suggests that the meaning of Section 628(c)(2)(C) can best be revealed by a literal reading, without the parenthetical phrase beginning with "including." NRTC regards this phrase as merely illustrative. While the use of the word "including" does support NRTC's interpretation that the reference to cable operators is simply an example,[85] NRTC's reading would eliminate the defining reference for the words "such programming" that immediately follow. An alternate interpretation of the Section is that the "including" phrase supplies the definition for the whole section through the words "such programming," i.e., programming that is the subject

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recommended against approval of the various decrees warning, *inter alia*, that the court's apparent blessing of exclusivity would encourage arguments by proponents of exclusivity that the Commission should find no need to prohibit exclusivity in light of the court's apparent willingness not to prohibit it. *Memorandum of Law of the Federal Communications Commission as Amicus Curiae* at 14, filed August 23, 1993, *State of New York ex rel. Abrams v. Primestar Partners*, No. 93-3868 (S.D.N.Y.)("*Memorandum*"). Indeed, in support of its position the Commission noted the reconsideration pending in this proceeding and referenced USSB's argument in this proceeding that the Primestar decrees essentially sanction exclusivity in the DBS context. *Memorandum* at n. 24.

[84] *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1557 ( E.D.Cal 1992) (citing Sutherland Stat. Const. § 46.04 at 99 (5th ed. 1992)). In this regard, we note that the Commission has received letters from members of Congress involved in legislative debates on the 1992 Cable Act that support conflicting interpretations of that provision. For example, *compare Ex Parte* Letter from Representatives Rick Boucher, Ron Wyden, Jim Slattery, Ralph Hall, Billy Tauzin, Jim Cooper, Blanche Lambert and Mike Synar to Chairman Hundt, June 15, 1994, *with Ex Parte* Letter from Senator Jeff Bingaman to Chairman Hundt, July 6, 1994; *Ex Parte* Letter from Rep. Al Swift to Chairman Hundt, July 8, 1994; *Ex Parte* Letter from Rep. Henry A. Waxman to Chairman Hundt, Aug. 16, 1994; *Ex Parte* Letter from Senators Bob Packwood and Dan Coats to Chairman Hundt, Aug. 24, 1994; *Ex Parte* Letter from Rep. Thomas Manton to Chairman Hundt, Aug. 30, 1994; *Ex Parte* Letter from Representatives Harris W. Fawell, Philip M. Crane, Steven H. Schiff, Carlos J. Moorhead, Scott L. Klug, Cardiss Collins, Jack Fields and J. Dennis Hastert to Chairman Hundt, Aug. 24, 1994.

[85] *Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102, 1112 n. 26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list [] that follows is illustrative, not exclusive.")

of an exclusive contract with a cable operator. Neither interpretation is perfect. NRTC's interpretation would negate the predicate for use of the phrase "such programming." The alternative interpretation would negate the illustrative implication of the term "including." The "including" and the "such programming" language cannot be reconciled simply from the statutory language. Although the language of Section 628(c)(2)(C) is capable of being read to suggest that the Commission is required to consider practices other than exclusive contracts between cable operators and their affiliated programmers within the prohibition, because the legislative history is silent as to conduct that should be prohibited *per se*, other than cable operators' practices, the Commission believes that its current implementing rule is the most reasonable interpretation of Section 628(c)(2)(C).[86]

35. The legislative history of Section 628 specifically, and of the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies, and did not address any such abuses exercised by non-cable technologies, such as DBS. Congress expressly declared its policy to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[87] Congress found that, as a result of increased vertical integration between cable operators and cable programmers, "cable operators have the incentive and ability to favor their affiliated programmers" and "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[88]

36. The legislative history of Section 628(c)(2)(C) more particularly illustrates congressional concern over cable operators' use of exclusivity to stifle competition from other technologies. The Conference Report describes the House provisions on unserved areas (which ultimately were adopted in Section 628(c)(2)(C) with modifications) as follows:

> With regard to areas not passed by a cable system, the regulations required by the House amendment prohibit exclusive contracts and other arrangements between a *cable operator* and a vendor which prevent a multichannel video programming distributor from obtaining programming from a satellite cable programming vendor

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[86] Indeed, if NRTC's interpretation were adopted, it could be argued that NRTC's exclusive marketing agreements, *supra* ¶ 9, could themselves violate this provision of the 1992 Cable Act. Although DirecTV is not a satellite cable programming vendor in which a cable operator has an attributable interest, its exclusive agreement with NRTC precludes competitors of NRTC from accessing certain vertically integrated services that are distributed over DBS only by DirecTV.

[87] 1992 Cable Act, § 2(b)(5).

[88] 1992 Cable Act, § 2(a)(5).

affiliated with a cable operator.[89]

During the House floor debates on the amendment to the House bill (which ultimately became Section 628 with modification) the sponsor and supporters of the amendment emphasized its importance in lifting barriers to entry into the video distribution market by competing technologies imposed by the cable industry's "stranglehold" over programming through exclusivity.[90] In contrast, the legislative history is silent with respect to the use of exclusive programming contracts by non-cable competing technologies. While we recognize that silence as to non-cable technologies is not inherently dispositive in light of the ambiguous statutory language, we give great weight to the legislative history's emphasis on cable operators.

37. Our interpretation is bolstered by the fact that, given the statute's distinction between cable operators' exclusive contracts in areas served and unserved by cable, the Commission's inclusion of DBS exclusive contracts within the *per se* prohibition of Section 628(c)(2)(C) could have an unintended effect on the DBS industry. While Section 628(c)(2)(C) prohibits exclusive contracts between cable operators and programming vendors with cable affiliation in areas that are not served by cable, Section 628(c)(2)(D) allows such contracts in areas that are served and where the Commission determines the contracts are in the public interest. Moreover, DBS distributors, unlike cable operators, would not be required to seek a public interest determination for areas served by cable because Section

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[89] Conference Report at 92 (emphasis added).

[90] *See* 138 Cong. Rec. H6534 (daily ed. July 23, 1992) (statement of Rep. Tauzin) ("There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so . . . our amendment says that exclusive programming that is not designed to kill the competition is still permitted."); 138 Cong. Rec. H6537 (daily ed. July 23, 1992) (statement of Rep. Houghton) ("[The Tauzin Amendment] gives an even break to people who want to get in the business"); 138 Cong. Rec. H6539 (daily ed. July 23, 1992) (statement of Rep. Lancaster) ("New technologies ... are ready to compete with cable. ... But the cable industry has done everything in its power to keep these competitors from getting off the ground. Cable programmers, who also own local cable companies, have denied competing technologies access to their programming--either by refusing to sell or by charging ridiculously high prices."); 138 Cong. Rec. H6540 (daily ed. July 23, 1992) (statement of Rep. Eckart) ("they [cable industry] know that if they maintain their stranglehold on this programming, they can shut down competition--even the deep pockets of the telephone companies for a decade or more."); 138 Cong. Rec. H6541 (daily ed. July 23, 1992) (statement of Rep. Harris) ("[W]ithout access to quality and diverse programs, these [new] technologies may never get off the ground. Vertically integrated cable companies have the ability to choke off these potential competitors by keeping a stranglehold over programming.").

628(c)(2)(D) specifically applies only to cable operators' exclusive contracts. If Section 628(c)(2)(C) is read to prohibit *per se* DBS exclusive contracts, such contracts would be completely permissible in served areas but prohibited in unserved areas. As a result, the DBS operators who do not possess the exclusive rights would have to identify and "block out" the served areas (where such exclusive contracts would be valid), while their distribution in the unserved areas could continue. There is no indication in the legislative history that Congress intended the DBS industry to engage in such an odd and potentially burdensome exercise. Nor is it clear why the DBS exclusive contracts, as opposed to cable exclusive contracts, would turn on whether the area is served *by cable*.

38. Our decision is supported by the rules of statutory construction that require us to examine the whole statute when interpreting a part.[91] While NRTC's interpretation of the "including" phrase, contained in Section 628(c)(2)(C), is a plausible reading taken in isolation, we believe that the more compelling rule of statutory construction is to construe the language in Section 628(c)(2)(C) in a manner most harmonious with the policies and the other provisions of the 1992 Cable Act.[92] We agree with Opponents that Section 628(c)(2)(C), read in conjunction with Section 628(c)(2)(D), supports the common understanding of Congress' intent in this Section to restrict cable operators' use of exclusive contracts in served and unserved areas.[93] The stated purpose of the program access provisions is to increase competition from non-cable technologies, to increase the availability of satellite programming to persons in rural areas and "to spur the development of communications technology,"[94] such as DBS. NRTC's petition runs counter to that

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[91] Sutherland Stat. Const. §§ 46.05, 47.02 at 103, 139 (5th ed. 1992); *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)("When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the legislature."); *see also Richards v. United States*, 369 U.S. 1, 11 (1962); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

[92] Viacom *Ex Parte* at 18 n.18 (citing Sutherland Stat. Const. § 46.05 at 103 (5th ed. 1992)).

[93] USSB Opposition at 6-7. Indeed, the contemporaneous understanding of Sections 628(c)(2)(C) and (D), that these sections only restricted cable operators' exclusive contracts, was articulated by most parties involved in the original rule making, including DirecTV. *See* Reply Comments of DirecTV in MM Docket 92-265, filed Feb. 16, 1993, at 12 n.11 and Appendix (summary of Tauzin amendment) ("The Commission is directed to prohibit any arrangement between a cable operator and a programming vendor, including exclusive contracts, which would prevent a distribution competitor from providing programming to persons unserved by a cable operator.").

[94] 47 U.S.C. § 548(a).

objective. Indeed, NRTC's interpretation of Section 628(c)(2)(C) necessarily would include any MVPD's exclusive contract and broaden the reach of the *per se* prohibition to all non-cable MVPDs. We believe that an outright ban on any MVPD exclusive contracts in areas unserved by cable, without any determination of the effect of such exclusivity on competition, defeats the very purpose of the 1992 Cable Act to foster competition from other non-cable technologies.

39. In addition to our interpretation of the statute, we find no evidence in the pleadings submitted in this proceeding that non-cable exclusive contracts of the type involved here are either harmful to the development of competition, "unfair" or "deceptive," or have negative effects on consumers. The record does not demonstrate that such contracts will hinder the development of DBS as an effective competitor to cable; that USSB's contracts with Viacom and Time Warner have impeded the entry either of DirecTV or NRTC into the DBS marketplace; or that the contracts generally have harmed the entry of DBS service into the multichannel video programming marketplace. Indeed, the evidence presented suggests that a DBS distributor's exclusive contract for programming covering one orbital location may foster DBS as a significant competitor to cable. Such contracts may allow a distributor to distinguish its service from that of another, avoid duplication of programming, and eventually lead to more diversity in programming for the consumer.[95] To the extent such contracts allow a greater number of DBS distributors to establish distinctive competing services, we believe they further congressional policy to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming."[96] In contrast to cable exclusivity in areas unserved by cable, which would foreclose services from non-cable multichannel video programming distributors, consumers will be able to receive all DBS programming from one DBS provider or another by being able to select specific programming services without having to purchase entire programming packages.[97] We agree with Opponents that prohibiting a DBS distributor's exclusive contract for programming covering one orbital location may in fact create unnecessary inefficiencies because the same programming could then occupy multiple transponders on the same satellite and decrease the diverse mix of programming available. Without prejudging any future complaints, we currently believe that the record before us provides no basis to conclude that the market power abuses, about which Congress was concerned, are present in the exclusive contracts at issue here.

40. Our reaffirmation of our interpretation of Section 628(c)(2)(C) does not foreclose all remedies to an MVPD that claims to be aggrieved by an exclusive contract between a non-cable MVPD and a vertically integrated satellite cable programming vendor. In the *First Report and Order*, we previously determined that while Section 628(b) does not

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[95] Viacom *Ex Parte* at 5-6; HBO *Ex Parte* at 7-8.

[96] *First Report & Order*, 8 FCC Rcd at 3369, ¶ 27 (citing 1992 Cable Act § 2(b)(2)).

[97] USSB Opposition at 14.

specify types of "unfair" practices that are prohibited, it "is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[98] The Commission did not sanction exclusive contracts between non-cable MVPDs and vertically integrated cable programming vendors, thus leaving open the possibility that such contracts could be challenged on the basis that they involve non-price discrimination or "unfair practices." Section 628(b) of the 1992 Cable Act and the Commission's implementing rule, Section 76.1001, provide a broad prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[99] Also in the *First Report and Order*, the Commission stated that Section 628(b) does not prescribe specific practices (in contrast to Section 628(c)), but does require a showing of anti-competitive harm, i.e., that the purpose or effect of the complained of conduct is to "hinder significantly or to prevent an MVPD from providing programming to subscribers or customers."[100] The Commission has stated that the objectives of the "unfair practices" provision are to provide a mechanism for addressing conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming fields, that inhibits the development of multichannel video programming distribution competition.[101] Therefore, where future contracts cause a restriction in the availability of programming to alternative distributors and their subscribers, an aggrieved MVPD could seek redress by filing an "unfair practices" complaint under Section 76.1001 of the Commission's rules.

41. Finally, we believe that using Section 76.1001 as an avenue to address non-cable exclusive contracts, such as those at issue here, will afford the Commission the opportunity to consider all the ramifications of such contracts, including the effect on competition, based upon the particular facts of each case. This case-by-case review will avoid amending a Commission rule to create an overly broad *per se* prohibition that appears to be contrary to Congress' intent.

42. For the reasons discussed above, we reaffirm our interpretation of Section 628(c)(2)(C) as reflected in our implementing rule. We believe that this is the most reasonable interpretation based on the fact that Congress specifically directed the Commission to prohibit exclusive contracts between cable operators and vertically integrated programming vendors in unserved areas, but did not specifically address the inclusion of exclusive

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[98] *First Report & Order*, 8 FCC Rcd at 3374.

[99] 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001.

[100] *First Report & Order*, 8 FCC Rcd at 3377.

[101] *Id.* at 3373, ¶ 40.

contracts between non-cable MVPDs and vertically integrated programming vendors within Section 628(c)(2)(C)'s prohibition. We believe that any complaints regarding exclusive agreements are more appropriately addressed through other provisions of the statute. Thus, the Commission denies NRTC's request.

## V. REGULATORY FLEXIBILITY ACT ANALYSIS

43. A final Regulatory Flexibility Act statement was published in the *First Report and Order* in MM Docket 92-265, at Appendix D. The decision taken here does not change that analysis.

## VI. ORDERING CLAUSE

44. Accordingly, IT IS ORDERED, that the Petition for Reconsideration of the National Rural Telecommunications Cooperative IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

DA 95-201

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| In the Matter of | ) | Fairfax County, VA |
| | ) | Fairfax, VA |
| MEDIA GENERAL CABLE OF | ) | Falls Church, VA |
| FAIRFAX COUNTY, INC. | ) | Herndon, VA |
| | ) | Vienna, VA |
| Appeal of Local Cable Rate Ordinances | ) | |
| | ) | |
| Request for Stay | ) | |
| of Local Cable Rate Ordinances | ) | |

## CONSOLIDATED ORDER

**Adopted:** February 9, 1995 **Released:** February 10, 1995

By the Chief, Cable Services Bureau:

## I. Introduction

1. Media General Cable of Fairfax County, Inc. ("MGC"), filed on November 3, 1994 an Appeal ("Appeal") of an Emergency Ordinance,[1] which was adopted by Fairfax County, Virginia ("County") on October 10, 1994.[2] On November 3, 1994, MGC also filed a Request for Stay of the Emergency Ordinance pending resolution of its Appeal.[3]

2. The County coordinated its cable rate regulation efforts with the following jurisdictions in which MGC provides cable television service: City of Fairfax, Va.; City of Falls Church, Va.; Town of Herndon, Va.; and Town of Vienna, Va. All five of the above-captioned jurisdictions (collectively, "Communities") adopted the analysis performed by a consultant employed to analyze MGC's rates. All of the jurisdictions adopted virtually identical ordinances ("Ordinances") setting rates for MGC's basic service tier and associated

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[1] The Emergency Ordinance has since been supplanted by a permanent ordinance adopted by the County on October 31, 1994.

[2] The County submitted an Opposition ("Opposition") to MGC's Appeal on November 18, 1994. MGC submitted a reply to the County's Opposition on November 28, 1994.

[3] As discussed in paragraph 12, *infra*, MGC's Request for Stay is dismissed as moot in light of the decision on the merits herein.

equipment and installations.[4] Accordingly, in its Appeal, MGC requested that the Commission consolidate all of the Ordinances for review in this proceeding.[5] In the interest of administrative efficiency, the Commission will consolidate all of the Communities' Ordinances for review in the instant proceeding and this Consolidated Order is applicable to all of the Communities captioned above.

3. In the Ordinances, the Communities approved MGC's basic service tier rates, but recalculated and reduced MGC's regulated rates for its equipment and installations, pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992").[6] The Communities also ordered MGC to issue refunds or credits to subscribers for those charges collected prior to July 14, 1994, which were in excess of MGC's maximum permitted equipment and installation rates.[7]

4. In its Appeal, MGC challenges only those portions of the Ordinances in which the Communities ordered MGC to refund all equipment and installation overcharges prior to July 14, 1994. MGC submits that it properly calculated its equipment and installation charges and that the Communities' recalculations are in error. Accordingly, MGC requests that the Commission overturn those portions of the Ordinances which order MGC to refund all equipment and installation overcharges prior to July 14, 1994.

## II. Standard of Review

5. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[8] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising

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[4] Appeal, at p. 1; Opposition, at p. 1.

[5] In its Opposition, the County does not oppose MGC's request that the Commission consolidate all five Ordinances for review in this proceeding.

[6] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[7] Effective July 15, 1994, MGC reduced its equipment and installation rates to the levels found permissible in the Ordinances. This reduction resulted from MGC's deduction of interest expenses in its recalculation of its equipment and installation rates on the Commission's new Form 1205. MGC states that it agrees with the Communities that its new equipment and installation rates are appropriate on a going forward basis. Appeal, at p. 2.

[8] 47 C.F.R. §76.944.

authority's decision as long as there is a reasonable basis for that decision.[9] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[10] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[11]

## III. Discussion

6. In order to justify its rates for the basic service tier, MGC submitted a cost of service filing to the Communities. Although the Commission determined that a benchmark and price cap approach should serve as the primary method for regulating basic service tier and cable programming service tier rates, the Commission also concluded that because the benchmark methodology might not produce fully compensatory rates in all cases, it was appropriate to permit operators, as an alternative, to justify rates based on costs, using individual cost of service showings.[12] The cost of service approach was intended to be used only if an operator believed that the maximum permitted rate under the benchmark formula would not enable the operator to recover costs reasonably incurred in providing rate regulated cable services.

7. Although MGC submitted a cost of service filing to the Communities, the sole issue raised in MGC's Appeal involves the calculation of its equipment and installation rates on FCC Form 393. Because equipment and installation rates are subject to regulation on an actual cost basis in both benchmark and cost-of-service proceedings, an operator's maximum permitted equipment and installation rates would be the same under both methodologies. FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations are reasonable. FCC Form 393 is divided into three (3) separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period under review. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

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[9] *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5731 (Rel. May 3, 1993) ("*Rate Order*"); *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (Rel. March 30, 1994).

[10] *Id.*

[11] *Id.*

[12] *Rate* Order, 8 FCC Rcd at 5794-95; *see also*, 47 C.F.R. §76.922.

8. In Schedules A, B, C and D of Part III, an operator calculates (1) the capital costs of leased customer equipment; (2) the capital costs associated with service installations and the maintenance of customer equipment; (3) the annual operating expenses for installations and maintenance of equipment; and (4) the average installation charges for the various types of installations which the operator performs. As part of an operator's calculation of its annual capital costs (for both its customer equipment and for items associated with the installation of cable service and the maintenance of customer equipment), the operator must include in Schedules A and C any "federal and state income taxes payable by the cable entity."[13] The operator then adds these income tax obligations to (1) its return on investment; and (2) its annual depreciation expense to determine its total capital costs. Therefore, the higher an operator's state and federal income tax liability, the higher its annual capital costs, which is one of the bases upon which an operator determines its maximum permitted equipment charges in Steps C, D and E of Part III of FCC Form 393.[14] The higher an operator's capital costs, the higher its maximum permitted equipment and installation rates.

9. The Communities contend that the amount of income taxes MGC included in its equipment and installation rates in Schedules A and C of Part III of FCC Form 393 was overstated. It is the Communities' position that because MGC did not adjust its income tax figures in Schedules A and C to reflect the deductibility of interest expenses from any state and federal income taxes owing or paid, the amount of income tax included in its equipment and installation rates was inflated, thereby causing its equipment and installation rates to be artificially high. The Communities contend that MGC should not be permitted to assess a rate based upon expenses which it had not actually incurred or prudently should not have incurred. MGC does not dispute that interest is an expense that is deductible for purposes of computing income tax obligations. Rather, MGC contends that it relied upon the instructions accompanying the Commission's Form 393, which do not require a deduction for interest expenses.[15] The Communities rebut MGC's argument by contending that MGC should have read FCC Form 393 to assume the obvious principle of the tax deductibility of interest expenses when it calculated its income tax obligations on Schedules A and C of FCC Form

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[13] FCC Form 393, at pp. 33-34. The instructions to FCC Form 393 do not discuss any adjustments that should be made to income tax figures to reflect the deductibility of certain items.

[14] The other bases upon which an operator determines its maximum permitted equipment charges are the following: total maintenance/service hours for the type of equipment in question; the operator's hourly service charge; and the number of units of the type of equipment in question which the operator currently has in service.

[15] While the instructions accompanying FCC Form 1205, one of the successor forms to FCC Form 393, specifically require that interest expenses be deducted from income taxes, the instructions accompanying FCC Form 393 do not contain such a directive. FCC Form 1205, at pps. 8-9; FCC Form 393, at pps. 33-34. As noted in footnote 7, *supra*, MGC did deduct its interest expenses when it recalculated its income tax obligations on FCC Form 1205.

393.

10. MGC also advances what it terms an "analytically discrete" reason why it should not be required to refund its alleged equipment and installation overcharges. MGC claims that the Communities' consultant's report states that MGC could have charged its subscribers up to an additional $3.5 million per year for basic tier service. Thus, MGC claims that had it been adequately advised as to what was required in the FCC Form 393 equipment and installation calculations, it would have increased slightly its basic service rates in order to keep revenues at the level that management decided were required. The Communities effectively rebut this argument by pointing out that MGC had the opportunity to make this precise adjustment beginning July 15, 1994, when it began deducting interest expenses from its total income tax obligation in its equipment and installation calculations on FCC Form 1205. MGC declined to do so.

11. As noted in paragraph 5, *supra*, the Commission will sustain a franchising authority's decision as long as there is a reasonable basis for that decision. After a careful review of the record in the instant proceeding, and given the well-known principle of the tax deductibility of certain interest expenses, we find that the Communities' Ordinances are based upon a reasonable interpretation and application of the Commission's rules and forms. Accordingly, we deny MGC's Appeal.

## IV. Ordering Clauses

12. Accordingly, **IT IS ORDERED** that the Appeal filed by Media General Cable of Fairfax County, Inc. is **DENIED.**

13. **IT IS FURTHER ORDERED** that, in light of the resolution of its Appeal herein, the Request for Stay filed by Media General Cable of Fairfax County, Inc. **IS DISMISSED** as moot.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

**DA 95-158**

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| In the Matter of: | ) |
| | ) |
| CENTURY CABLE TELEVISION | ) |
| | ) |
| Interlocutory Appeals of | ) |
| Initial Decisions of City | ) |
| of Muncie, Indiana | ) |

## CONSOLIDATED ORDER

**Adopted**: February 6, 1995 **Released**: February 7, 1995

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. By this Order, we consolidate two proceedings into one and rule on the merits in each proceeding. In deciding this appeal, the Bureau has reviewed all the pleadings filed in each of the separate proceedings. We have determined that the two proceedings are sufficiently similar and related to one another to justify the joint resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.[1] Specifically, the Bureau resolves in this Consolidated Order the two "Petition[s] for Interlocutory Review of Initial Decision" of two initial decisions adopted by the City of Muncie, Indiana (the "City")

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[1] The two separate petitions filed by Century are identical and raise the same single issue: the appropriate regulatory treatment of four channels offered collectively as well as individually on an a la carte basis. Because of the similarity of Century's two petitions we will refer to them, collectively, as "Petitions."

filed by Century Cable Television ("Century") on July 25 and August 25, 1994.[2] By letters dated July 11, 1994 and August 22, 1994, the City made initial determinations that for the purpose of evaluating Century's Forms 393 and 1200, respectively, the channels contained in Century's "Century Select" package are subject to rate regulation.[3]

2. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order,* MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) ("*Second Reconsideration Order*"), the Commission provided that as part of their review of basic service tier rates, local authorities may make an initial decision addressing only the regulatory status of any a la carte package at issue.[4] The Commission further provided that the local authority's initial decision may be appealed to the Commission within 14 days and that the issuance of an initial decision on a la carte issues will toll the time period within which local authorities must decide local rate cases.

## II. DISCUSSION

3. Century objects to the City's findings in its initial decisions that the channels comprising the Century Select a la carte package must be included as regulated channels.

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[2] Other filings in this proceeding include the City's Request for Acceptance of Late-Filed Pleading in Response to Petitions for Interlocutory Review of Initial Decision Under § 76.986 and Response to Petition for Interlocutory Review of Initial Decision ("Answer"), filed by the City on September 19, 1994; an Opposition to Request for Acceptance of Late-Filed Pleading and Reply to Response to Petition for Interlocutory Review of Initial Decision Under Section 76.986, filed by Century on September 29, 1994; and a Reply to Opposition to Request for Acceptance of Late-Filed Pleading and Reply to Response to Petition for Interlocutory Review of Initial Decision under § 76.986, filed by the City on October 6, 1994. In its Opposition and Reply Century correctly notes that the City's Answer was filed late. Our rules require that opposition be filed within 15 days after the appeal is filed, which was August 9 and September 9, 1994, in the instant case. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5730-31 ("*Rate Order*"). We need not strike the City's Answer from the record, however, because the result we reach herein is based on grounds other than those set forth in the City's Answer. In particular, our decision herein is based on our previous order in *Century Cable TV,* Muncie, Indiana, LOI 93-18, DA 94-1354 (Cab. Serv. Bur., released Dec. 2, 1994) ("*Century Muncie*"). *See* para. 5, *infra*.

[3] The Century Select channels are offered in a package or on an individual ("a la carte") basis.

[4] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

Century contends that the City's initial decisions are "wholly conclusory" and fail to offer any basis for the determination that the a la carte package should be treated as a rate-regulated tier in evaluating Century's Form 393 and Form 1200. Century also contends that the City's jurisdiction to decide issues regarding a la carte service is contrary to the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") which limits local regulatory jurisdiction to basic service.[5] Century further argues that the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status of a la carte channels cannot be applied retroactively.[6] The City responds that § 76.986(b) of the Commission's Rules allows local franchising authorities to notify operators of initial decisions regarding treatment of a la carte channels without issuing a written decision underlying the initial determination.[7] In addition, the City contends that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Century's Select package should be treated as rate-regulated channels.

4. Century's a la carte package at issue, consisting of CNN, Turner Network Television, TNN and the Discovery Channel, was first offered to subscribers on September 1, 1993, when Century restructured the service offerings on its Muncie system. Century states that its September 1, 1993 restructuring involved offering four channels that previously had been offered on its former cable programming service tiers on an individual basis and also as the Century Select package that it alleges is not subject to rate regulation.

5. The issue raised by Century's appeal already has been resolved in one of our letter of inquiry orders, *Century Muncie*.[8] In *Century Muncie* we found we could not say that it was clear that the Century Select package offered by Century on its Muncie, Indiana system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Century to refund liability or to require Century to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the Century Select package may be treated

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[5] *July 25 Petition* at 3; *See* Communications Act of 1934, as amended, § 623 (c), 47 U.S.C. § 543 (c) (1992).

[6] *July 25 Petition* at 3-4. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214-4217.

[7] Answer at 6. The City contrasts this provision with § 76.936 which, it argues, requires a written decision whenever a local franchising authority disapproves initial rates for a basic service tier.

[8] *See* footnote 1, *supra*.

as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) ("*Going Forward Order*").[9]

6. We find that the City's determinations in its two initial decisions that the channels comprising Century's a la carte package must be included as regulated channels is inconsistent with the action taken in *Century Muncie*. We further find that, in accordance with *Century Muncie*, Century's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Century's Petitions are granted. We are remanding this issue to the City so that it can enter orders consistent with our findings in *Century Muncie*.[10]

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[9] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[10] We need not address Century's argument with respect to the conclusory nature of the initial decisions or the retroactive application of the 15 guidelines set forth in the *Second Reconsideration Order,* in light of the fact that we grant Century's Petition and remand the City's initial decision. In addition, Century's argument that the City has no jurisdiction to determine the regulatory status of a la carte service offerings is without merit. The City's initial decisions were adopted on July 11, 1994 and August 22, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that "local authorities may make any necessary a la carte determination as part of their final decision setting rates for the basic tier. *Second Reconsideration Order*, 9 FCC Rcd at 4217. This provision allows local authorities to make a determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

## III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the Petitions for Interlocutory Review of the initial decisions, with respect to the issue of the regulatory status of Century's a la carte package, are **REMANDED** to the City for resolution in accordance with the terms of this Order.

8. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**

DA 95-215

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| In the Matter of | ) | |
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| | ) | |
| Local Exchange Carriers' Rates, | ) | CC Docket No. 94-97 |
| Terms, and Conditions for | ) | |
| Expanded Interconnection through | ) | |
| Virtual Collocation for | ) | |
| Special Access | ) | |
| and Switched Transport | ) | |

## ERRATUM

Adopted: February 10, 1995 ; Released: February 10, 1995

By the Acting Deputy Chief, Common Carrier Bureau:

1. On December 9, 1994, the Common Carrier Bureau (Bureau) released an Order, DA 94-1421, in the above-captioned proceeding (Virtual Collocation Tariff Suspension Order). This erratum corrects the caption of that Order by adding, for GTE System Telephone Companies, "Transmittal No. 121," and for GTE Telephone Operating Companies, "Transmittal No. 924."

2. Further, because Appendix C to our Virtual Collocation Tariff Suspension Order inadvertently neglected to address certain proposed rate elements filed by US West Communications, Inc. (US West) in US West Communication, Inc. Tariff F.C.C. No. 5, Transmittal No. 530, and by Southwestern Bell Telephone Company (SWB) in SWB Tariff F.C.C. No. 73, Transmittal No. 2407, we direct US West and SWB to adjust the proposed rates associated with these rate elements pursuant to the Virtual Collocation Tariff Suspension Order. Accordingly, US West and SWB must multiply each proposed rate by the ratio of the lowest overhead loading factor they have reported for a comparable service to the proposed overhead loading factor for that particular rate, as described in paragraphs 25 - 26 and Appendix C of the Virtual Collocation Tariff Suspension Order. US West and SWB must file tariff revisions within five business days from the release date of this Order, to become effective on one day's notice. These tariff revisions must reflect adjustments to the carriers' proposed rates effective December 15, 1994.

3. In addition, the first sentence of paragraph 61 of the Virtual Collocation Tariff Suspension Order should read as follows: " US West's tariff is silent on US West's obligation to base the direct costs of providing virtual collocation equipment on the lowest purchase price reasonably available to it to serve an interconnector." The second sentence of paragraph 64 of the December 9 Order should read as follows: "Although US West may purchase equipment from any vendor, it must compute the charge for that equipment based on the lowest purchase price reasonably available to it to serve an interconnector."

4. Accordingly, IT IS ORDERED that, for the above purposes, Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, ARE WAIVED. US West and SWB should cite the "DA" Number of this Order as the authority for filings made in compliance with this Order.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.

A. Richard Metzger, Jr.
Acting Deputy Chief, Operations
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-49

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Price Cap Performance Review | ) | CC Docket No. 94-1 |
| for Local Exchange Carriers; | ) | |
| Treatment of Video Dialtone Services | ) | |
| Under Price Cap Regulation | ) | |

# FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995 Released: February 15, 1995

Comment Date: April 17, 1995
Reply Comment Date: May 17, 1995

By the Commission:

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## I. INTRODUCTION

1. In 1992, the Commission modified its rules to permit Local Exchange Carriers (LECs) to offer video dialtone service.[1] In formulating rules to govern the provision of video dialtone, the Commission considered whether additional regulatory measures were necessary to guard against cross-subsidization and other anti-competitive practices by telephone companies offering video dialtone service.[2] In the *Video Dialtone Order* and the *Video Dialtone Reconsideration Order*, the Commission noted that several parties had contended that the existing safeguards against cross-subsidization should be strengthened by adopting rules specifically designed to identify and prevent cross-subsidies in video dialtone offerings.[3] Several parties specifically proposed that the Commission establish a separate price cap basket for video dialtone services.[4]

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[1] *See* Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991), *recon.*, 7 FCC Rcd 5069 (1992), *aff'd sub nom.*, National Cable Television Association v. FCC, 33 F.3rd 66 (D.C. Cir. 1994); Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (*Video Dialtone Order*), *appeal pending sub nom.*, Mankato Citizens Telephone Company, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992) and *modified on recon.*, FCC 94-269, _ FCC Rcd _ (rel. Nov. 7, 1994) (*Video Dialtone Reconsideration Order*).

[2] For example, telephone companies could engage in cross-subsidization and predatory pricing by setting rates for their video dialtone services below their incremental costs and recovering such costs from telephone ratepayers. Under price cap regulation, a carrier's ability and incentive to shift costs from one service to another is restricted by the grouping of services into baskets, each subject to its own price cap. Whenever a set of rates is subject to a price cap, carriers have no incentive to shift costs into the basket because the cap does not move in response to endogenous cost changes.

[3] *See Video Dialtone Order*, 7 FCC Rcd at 5824-27; *Video Dialtone Reconsideration Order* at paras. 157-60.

[4] *See, e.g.*, American Telephone & Telegraph (AT&T) Comments at 12-13 (filed Jan. 23, 1992); Pennsylvania Office of Consumer Advocacy (POCA) Comments at 23-25 (filed Jan. 23, 1992); United States Small Business Administration (SBA) Comments at 34-35 (filed Jan. 23, 1992) in *Video Dialtone Order* at para. 86 n.223 (requesting clarification that a separate price

2. The Commission concluded in the *Video Dialtone Reconsideration Order* that video dialtone service offerings by LECs subject to price cap regulation would be subject to the existing price cap rules.[5] The Commission also tentatively concluded, however, that a separate price cap basket for video dialtone services would help to avoid improper cross-subsidization by preventing local telephone companies from offsetting a price reduction for video dialtone service with an increase in rates for other regulated interstate services.[6] The Commission tentatively held that such a basket would protect interstate telephone ratepayers and deter anti-competitive pricing of video dialtone services.[7] The Commission indicated in the *Video Dialtone Reconsideration Order* that it would seek comment on establishing a separate price cap basket for video dialtone services in a supplemental notice as part of the *Price Cap Performance Review*[8] proceeding. We now adopt this Further Notice of Proposed Rulemaking to invite comments on our tentative conclusion. We also seek comment on other revisions to our price cap rules that may be necessary in the event that we affirm our tentative conclusion.

## II. BACKGROUND

### A. Video Dialtone Service

3. Under the two-level regulatory framework established in the *Video Dialtone Order*, a LEC may offer both "basic" and "enhanced" services. The "basic" video dialtone service consists of two elements: (i) a common carrier platform made available to multiple video programmers on a non-discriminatory basis; and (ii) the means by which customers of video programmers can obtain access to any or all video programming offered over the platform.[9]

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cap basket be required for provision of video dialtone service); Consumer Federation of America and National Cable Television Association, Inc., Petition for Rulemaking and Request for Establishment of Joint Board at 10, 17-18 (filed Apr. 8, 1993) (CFA/NTCA Joint Petition); AT&T Comments to CFA/NTCA Joint Petition at 9-10 (filed May 21, 1993) in *Video Dialtone Reconsideration Order*, at para. 200 n.372 (requesting establishment of a separate price cap basket for video dialtone service).

[5] *Video Dialtone Reconsideration Order* at para. 161.

[6] *Id.* at paras. 167, 222-23.

[7] *Id.*

[8] Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd 1687, 1694 (1994) (*Price Cap Performance Review Notice*).

[9] The Commission has noted that the basic platform "could include transport, switching, interconnection between the telephone company and the video programmer, and a means of accessing the consumer." Services other than those that are basic or adjunct to the offering of

A carrier must first provide this basic platform before it may use the platform to offer "enhanced" services related to the provision of video programming on a non-common carrier basis.[10] Video dialtone service provided over the basic platform is a common carrier service subject to Title II tariffing and non-discrimination requirements.[11] Our existing safeguards apply to a LEC's provision of enhanced and other non-regulated service over the video dialtone platform.[12] These safeguards include accounting and cost allocation rules to separate enhanced and other non-regulated service costs from regulated service costs, and network disclosure rules that ensure that telephone equipment manufacturers and vendors have adequate notice of changes that could affect the compatibility of their equipment.[13]

4. In the *Video Dialtone Reconsideration Order*, we concluded that video dialtone service would be treated as a new service under the price cap rules because it adds to the range of options available to customers by giving multiple video programmers access to a basic common carrier platform for the first time.[14] We also concluded that consistent with our rules governing the pricing of new services, rates for video dialtone service must be designed to recover the direct costs of providing the service.[15] In addition to the generally applicable rules that specify the cost support that must be submitted with any price cap new service, we set forth specific guidelines for the LECs to follow in developing their rates for video dialtone

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basic service are not permitted on the basic common carrier platform. *Video Dialtone Order*, 7 FCC Rcd at 5810-12 nn.147, 150.

[10] Because the Commission concluded that marketplace forces, rather than governmental action, should determine the precise nature of enhanced video dialtone services, it did not dictate the functions of enhanced video dialtone gateways or other services. For example, the Commission noted, but did not require, that the enhanced video dialtone platform might include customized menus and directories to allow subscribers to select individualized programming and information services. *Video Dialtone Order*, 7 FCC Rcd at 5821 n.146.

[11] *Video Dialtone Order*, 7 FCC Rcd at 5810-12, 5827.

[12] *Id.* at 5828-29; *Video Dialtone Reconsideration Order* at paras. 224-33.

[13] *Video Dialtone Order*, 7 FCC Rcd at 5828-29; *Video Dialtone Reconsideration Order* at paras. 224-33.

[14] *Video Dialtone Reconsideration Order* at para. 206.

[15] *See* Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture: Policy and Rules Concerning Rates for Dominant Carriers, Report and Order, Order on Further Reconsideration, and Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79, 87-313, 6 FCC Rcd 4524, 4531 (1991) (*Part 69 ONA Order*), *second further recon.*, 7 FCC Rcd 5235, 5237 (1992) (*Part 69 ONA Reconsideration Order*).

service offerings. Those guidelines, among other things, directed the LECs to include as direct costs of video dialtone service: the costs and cost components associated with the primary plant investment that are incremental costs dedicated to video dialtone service; incremental costs that are associated with shared plant used to provide video dialtone and other services; a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services; costs in accounts other than primary plant accounts that are reasonably identifiable as incremental costs of video dialtone service; and a reasonable allocation of overheads.[16]

### B. The LEC Price Cap Plan

5. Under Section 61.42(d) of the Commission's rules,[17] price cap LECs must divide the access rate elements of their various interstate services among four baskets – common line, traffic sensitive, trunking and interexchange.[18] The aggregate price levels of services grouped within each of the price cap baskets may not exceed the maximum permitted by the price cap index (PCI) applicable to that basket.[19] Services within the traffic sensitive and trunking baskets are further subdivided into separate service categories, which place additional constraints on pricing.[20] The service categories prevent a LEC from offsetting increases in the prices of services within one category by reducing the prices of services in another category

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[16] *Video Dialtone Reconsideration Order* at paras. 217-20 (footnotes omitted).

[17] 47 C.F.R. § 61.42(d).

[18] *LEC Price Cap Order*, 5 FCC Rcd at 6811; *see also* Transport Rate Structure and Pricing, 9 FCC Rcd 615, 622-23 (1994) (*Transport Second Report and Order*).

[19] *LEC Price Cap Order*, 5 FCC Rcd at 6811.

[20] *LEC Price Cap Order*, 5 FCC Rcd at 6788; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2679; *Transport Second Report and Order*, 9 FCC Rcd at 622-23. The service categories within the traffic sensitive basket are: (1) local switching; (2) information; (3) database access; and (4) billing name and address. *LEC Price Cap Order*, 5 FCC Rcd at 6811; *see also* Treatment of Operator Services Under Price Cap Regulation, Notice of Proposed Rulemaking, CC Docket No. 93-124, 8 FCC Rcd 3655 (1993) (proposing to establish a new service category in the traffic sensitive basket for operator services rates). The service categories in the trunking basket are: (1) voice grade flat-rated transport; (2) audio and video; (3) high capacity and Digital Data Service (DDS); (4) wideband data and wideband analog; (5) tandem-switched transport; and (6) the interconnection charge. *LEC Price Cap Order*, 5 FCC Rcd. at 6811; *see also* Treatment of Operator Services Under Price Cap Regulation, 8 FCC Rcd 3655 (1993). Within the high capacity-DDS service category are subcategories for (1) DS1 special access and (2) DS3 special access and DS3 flat-rated transport. *Id.*

of the same basket.[21] There are no service categories in the common line or interexchange baskets.[22]

6. The formula that governs annual adjustments to a LEC's PCIs for the traffic sensitive, trunking, and interexchange baskets consists of three main elements – an inflation factor, a productivity offset, and exogenous costs.[23] The inflation factor is based on the Gross National Product Price Index (GNP-PI). The productivity offset, which is subtracted from the inflation factor, reflects the amount by which LEC productivity gains are expected to exceed productivity gains in the economy as a whole.[24] The resulting figure is also adjusted for a limited set of exogenous cost changes, generally those attributable to administrative, legislative, or judicial action beyond the carrier's control and not otherwise reflected in price cap calculations.[25] Within each basket, services may be grouped into service categories. Rate changes in any one year are also limited by rate bands. The rate band for each designated service category is computed around the Service Band Index (SBI)

7. The price cap baskets and service categories established by the Commission are designed to balance the competing interests of LECs and their ratepayers.[26] The Commission

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[21] *Transport Second Report and Order*, 9 FCC Rcd at 622-23.

[22] The Commission decided in the *LEC Price Cap Order* that service category subdivisions were not necessary in either the common line basket or the interexchange basket because all of the common line rate elements but one were to be priced according to Commission rules, and only a small amount of interexchange service was subject to price cap regulation. 5 FCC Rcd at 6811.

[23] The formula for the common line basket is slightly different from the formula used to cap the other three baskets. This arises because the actual costs of common line are non-traffic sensitive, but a portion of the cost is recovered through rates that are traffic sensitive. *LEC Price Cap Order*, 5 FCC Rcd at 6787, 6794-95.

[24] The minimum productivity factor for the traffic sensitive, trunking and common line baskets is 3.3 percent, which reflects historical telephone industry productivity growth of 2.8 percent and an annual Consumer Productivity Dividend (CPD) of 0.5 percent, for the three access service baskets. The productivity factor for the interexchange basket is 3.0 percent, matching the factor established for AT&T's interexchange services.

[25] *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*).

[26] *LEC Price Cap Order*, 5 FCC Rcd at 6810-11; *see also* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Second Report and Order, 8 FCC Rcd 4478, 4483 n.68 (1993) (*Billing Name and Address Order*).

intended to give LECs sufficient pricing flexibility as an incentive to be efficient and productive, without subjecting ratepayers to precipitous fluctuations in prices for LEC services or allowing LECs to discriminate against one class of ratepayers at the expense of another class.[27] Moreover, the assignment of services to price cap baskets and service categories is intended to replicate the effect that a competitive market would have on pricing practices.[28] Grouping services with common characteristics, such as similar levels of competition, within the same basket is intended to give the LECs pricing flexibility with respect to comparable services and to restrict the ability of LECs to offset increases for some services with rate decreases for dissimilar services. Price cap LECs receive streamlined tariffing procedures for rate changes that are within the appropriate PCI for the basket and, where applicable, within the service category bands.[29]

## III. DISCUSSION

### A. Price Cap Basket for Video Dialtone Services

8. We stated in the *Video Dialtone Reconsideration Order* that "video dialtone service does not fit into existing price caps baskets given its unique characteristic of transmitting the video services of multiple program providers to end users on a common carrier basis."[30] We therefore tentatively concluded that "a separate price cap basket for video dialtone would help prevent improper cross-subsidization by preventing local telephone companies from offsetting a price reduction for video dialtone service with an increase in rates for other regulated interstate services."[31] We seek in this proceeding to determine whether affirmation of this tentative conclusion will advance the public interest objectives that underlie our system of price cap regulation and video dialtone service rules. Specifically, we must determine whether the creation of a video dialtone service basket will further the price cap goals of promoting economic efficiency, ensuring reasonable nondiscriminatory rates, and reducing administrative costs.[32] We must also assess whether establishing a separate basket will further the Commission's objectives, articulated in its *Video Dialtone Reconsideration Order*, of facilitating competition in the provision of video services, promoting efficient investment in the national

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[27] *LEC Price Cap Order*, 5 FCC Rcd at 6810-11.

[28] *See, e.g., Price Cap Performance Review Notice*, 9 FCC Rcd at 1694.

[29] In contrast, LECs must file cost support to justify rate changes that fall outside the constraints applicable to baskets or service categories. *See* Section 61.49 of the Commission's rules, 47 C.F.R. § 61.49; *see also Transport Second Report and Order*, 9 FCC Rcd at 627 n.3.

[30] *Video Dialtone Reconsideration Order* at para. 222.

[31] *Id.*

[32] *Price Cap Performance Review*, 9 FCC Rcd at 1695.

telecommunications infrastructure, and fostering the availability of new and diverse sources of video programming to the public.[33] We invite parties to comment on whether and how establishment of a separate price cap basket for video dialtone service will advance these objectives.

9. We indicated in the *Video Dialtone Reconsideration* proceeding our tentative agreement with proponents of a separate price cap basket that this approach would help to ensure that telephone ratepayers do not improperly subsidize video dialtone service.[34] Parties also have contended that a separate basket is needed to protect cable operators and other providers of multi-channel video services from potential anti-competitive actions by LECs. They claim that LECs otherwise will have the incentive and ability to offset price decreases for video dialtone service with price increases for other regulated interstate services. We invite parties to comment on our tentative conclusion and to address specifically our concern that a separate basket is needed to address our cross-subsidy and competitive concerns.

10. The Commission previously has based its decision to create a separate price caps basket on an analysis of whether the service possesses characteristics, such as technical differences or the level of competition in the service markets, that were not shared by services in the existing baskets. The Commission concluded in the *LEC Price Cap Order*, for example, that it was necessary to establish a separate price cap basket for interexchange services because such offerings were found to be "fundamentally different" from special access services.[35] In addition, the Commission noted that:

> [p]lacing two very different services, with different sets of customers, in the same basket is a result [the Commission has] attempted to avoid due to the cross subsidy issues that might arise.[36]

11. In reaching our tentative conclusion that a separate basket is needed for this service, we noted that the technical and competitive characteristics of video dialtone are not similar

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[33] *Video Dialtone Reconsideration Order* at para. 3.

[34] *See id.* at para. 157 (joint petition for rulemaking filed by the Consumer Federation of America and National Cable Television Association).

[35] *LEC Price Cap Order*, 5 FCC Rcd at 6812.

[36] *Id.*

to any services in our existing price cap baskets. We invite parties to comment on this tentative finding that video dialtone offerings are different from, and compete for different customers than, services in the existing price cap baskets.[37]

12. As we stated in the *Video Dialtone Reconsideration Order*, video dialtone is but the first of what we expect to be an array of broadband services.[38] As discussed above, our current price cap rules group services with similar characteristics in the same basket. Consequently, it may be desirable to group broadband services whose technical or other characteristics, such as the availability of competitive alternatives, are similar to video dialtone service in the same price cap basket with video dialtone service. Such a requirement may increase the pricing flexibility of LECs with respect to broadband services, such as video dialtone, while restricting their ability to offset price changes for such services with price changes for dissimilar services. We request comment on whether the Commission should establish a new price cap basket that would include not only video dialtone services, but also other broadband, transport-related services. Parties favoring this approach should describe the criteria that should be used to determine the services that should be included in such a basket.

13. LECs have claimed in our video dialtone rulemaking that the rates for this service should be included within the existing price cap baskets. BellSouth, for example, asserted in its comments in the *Video Dialtone Reconsideration* proceeding that video dialtone is a transport service that will fit comfortably into the existing price cap baskets depending upon how the service is offered.[39] We invite commenters who advocate inclusion of video dialtone service in an existing price cap basket to identify the specific basket and, if applicable, service category in which the rates for this service should be placed and to explain the basis for their proposal. Commenters favoring this alternative should also show that video dialtone service possesses characteristics that are similar to the services that are currently included in the basket they propose, including the availability of competitive alternatives. Furthermore, the commenters should address the concern that inclusion of video dialtone service in an existing basket would permit LECs to cross-subsidize their entry into video service improperly and to engage in anti-competitive practices.

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[37] AT&T notes in its comments to the *Price Cap Performance Review Notice*, for example, that the "potential competitive nature" of the video dialtone services that are the subject of recently granted or pending Section 214 applications may warrant a separate price cap basket for these services. *See* AT&T Comments at 40 n.59.

[38] *Video Dialtone Reconsideration Order* at para. 188.

[39] BellSouth Comments at 14.

## B. Implementation Issues

### 1. The Productivity Factor

14. If the Commission decides to create a separate video dialtone basket, it will be necessary to determine whether the price cap formula that is used to adjust the PCIs for the other LEC interstate access service baskets should be used for the video dialtone basket. In particular, the Commission will have to address whether the same productivity factor (currently 3.3 percent or 4.3 percent) should be used. Selection of a reasonable productivity factor for a video dialtone basket is crucial to ensuring that price cap regulation of this service would be efficient and fair to LECs, their customers, and consumers. If the productivity factor is too low, prices will be too high, depressing demand from consumers and leading to inefficiently low levels of traffic. If the productivity factor is set too high, investment may be discouraged because carriers may conclude that investment of capital in other ventures and services is more attractive than providing video dialtone service.

15. In the *LEC Price Cap Order*, the Commission determined that the GNP-PI does not fully reflect that the LECs' higher than average growth in productivity had produced lower than average telephone prices, relative to inflation. We therefore concluded that a productivity factor offset must be included in the price cap formula to ensure that rates continued to decline in relation to the GNP-PI. Our selection of a 3.3 percent productivity factor for the interstate access baskets was based largely upon two Commission staff studies investigating the extent to which LEC productivity in the provision of interstate services historically had outperformed the economy as a whole. A short term study examined productivity trends in interstate access from 1984 through 1990; a long term study covered interstate charges generally for the years 1930 through 1989. A 0.5 percent Consumer Productivity Dividend (CPD) was added (to arrive at a productivity factor of 3.3 percent) to ensure that the first price cap productivity gains would be assigned to customers in the form of lower rates. As noted above, we selected a factor of 3.0 percent for the interexchange basket, because that was the factor we previously had computed for AT&T's interexchange services. We also note that we recently declined to include a productivity offset in the price cap formula applicable to cable television rates.[40]

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[40] *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation*, 9 FCC Rcd 5760 (1994). In the *Cable Order*, the Commission determined that "a productivity offset should be based to the extent possible on observed efficiency gains experienced by the cable industry." *Id.* at 5761. The Commission found that the only study submitted in the docket that "purported" to provide an economic analysis in support of a productivity offset factor for cable service was not based on an analysis of costs or productivity in the cable industry. The Commission therefore concluded that the record did not provide an adequate factual basis for the incorporation for a productivity offset in the price cap governing cable service rates. *Id.*

16. We invite parties to comment on the appropriate formula to be used to adjust the PCI for a video dialtone price cap basket in the event we affirm our tentative conclusion to require a separate basket. Parties advocating the use of the same formula that is applied to other baskets should explain why that approach is reasonable since the historical data upon which the current minimum productivity factor is based did not include information concerning the LECs' provision of video dialtone service. Parties advocating a different formula (*e.g.*, formulas that do not include a productivity factor) should explain the basis for their proposed formulas. Advocates of either approach should address whether the Commission should include a CPD in setting the productivity factor for a video dialtone basket. We also request comment on whether adjustments might be needed to the other price cap baskets arising from the price cap LECs' more efficient use of common plant and shared expenses between video dialtone and pre-existing services. Such adjustments might include, for example, changes in the productivity factors for the other price cap baskets.

### 2. Setting the Initial Price Cap

17. If we create a separate price cap basket for video dialtone service, we must decide how to set the initial price cap for the basket. In the *LEC Price Cap Order*, the Commission determined that the July 1, 1990 LEC interstate access rates (adjusted downward to implement the 11.25 percent industry rate of return adopted by the Commission on the same day as the LEC price cap rules) were the best set of rates from which to initiate price cap indexing. In reaching its decision, the Commission stated that the July 1, 1990 rates were the culmination of a six-year history of developing, refining, and overseeing the Commission's administration of rate of return regulation. The Commission noted that these rates were the result *inter alia* of a revised system of tracking costs (*i.e.*, the Uniform System of Accounts (USOA)), cost allocation procedures to separate nonregulated costs from the combined regulated and nonregulated costs recorded in USOA accounts, and related reporting requirements. The Commission also noted that the rates reflected a tariff review process that ensured that the Common Carrier Bureau had usable and reliable cost support in reviewing a LEC's annual access charge revisions. As a result of this process, the Commission decided that these rates in general provided the "most reasonable basis from which to launch a system of price cap regulation."[41]

18. We tentatively conclude that in the absence of a long history of regulatory review and oversight of the video dialtone rates, the best approach for establishing the initial rates to be included in a video dialtone basket would be to apply our existing rules for new services. As noted *supra*, the Commission has already determined that for purposes of the initial

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[41] *LEC Price Cap Order*, 5 FCC Rcd at 6814; *see also Price Cap Performance Review Notice*, 9 FCC Rcd at 1696 (as part of its fourth year review of the LECs' performance under price cap regulation, the Commission requested comment on "whether a one-time change in the LECs' price cap index should be required.").

offering, video dialtone services are subject to the new services rules. Under these rules, new services are excluded from price cap baskets and indexes when the services are first introduced. The new services are incorporated into baskets and reflected in the price cap indexes at the first annual price cap filing following the calendar year in which the new service has been offered, a period of between 6 and 18 months after the introduction of the new service, depending upon the timing of the introduction of the new service.[42] Consistent with our treatment of other new services under the LEC price cap regulation, we believe that video dialtone services should be folded into the video dialtone basket at the first annual price cap filing following the calendar year in which the new service is first offered. Further, consistent with the approach we followed in initializing the indexes for the existing price cap baskets, we recommend that the price cap index and the actual price index for a new video dialtone basket be assigned an initial value of 100 prior to adjustment for inflation and productivity, corresponding to the rates in effect just prior to the effective date of the annual filing in which the video dialtone basket is introduced.[43]

19. We invite comment on our tentative conclusion regarding the method the Commission should use for setting the initial rates for a new price cap basket for video dialtone.

### 3. Service Category Bands

20. The Commission concluded in the *Video Dialtone Reconsideration Order* that the basic video dialtone platform is a form of interstate access to the extent it is used to route interstate video programming to end users.[44] The Commission further stated in the *Video Dialtone Reconsideration Order* that service offered over the basic video dialtone platform could potentially include transport, switching, interconnection between the telephone company and the video programmer, and a means of accessing the consumer.[45] Although the Commission indicated that it would treat video dialtone as a switched access service, it declined to prescribe new rate elements for video dialtone and, instead, directed telephone companies seeking to offer video dialtone service to file petitions for waiver of Part 69 prior to the establishment of a permanent video dialtone rate structure.[46] We seek comment on whether video dialtone

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[42] *Id.* at 6825; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2693.

[43] *See, e.g.*, Section 61.42 of the Commission's Rules, 47 C.F.R. § 61.42(d).

[44] *Video Dialtone Reconsideration Order* at para. 195.

[45] *See* note 9 *supra*.

[46] *Id.* at paras. 196-98 n.368, *citing* Provisions of Access for 800 Service, 4 FCC Rcd 2824, 2833 (1989) (permitting carriers to receive Part 69 waivers to establish separate unbundled subelements for 800 data base access and vertical features prior to the establishment of a permanent rate structure); Southwestern Bell Telephone Company, Petitions for Wavier of

service offerings may require establishment of separate service categories if the Commission established a separate video dialtone basket. Commenters proposing establishment of such service categories should discuss in detail why further subdivision of a video dialtone services price cap basket is necessary or desirable.

21. Under the price cap rules, pricing bands apply to each service category. The pricing bands limit the amount by which the carrier can raise or lower a rate without making a special showing. Tariff filings that propose rates within the pricing bands (and at or below the price cap for the basket) are reviewed on a streamlined basis, *i.e.*, on 14 days' notice, with a presumption of lawfulness. Above-band rates are filed on 90 days' notice and must be accompanied by a showing of substantial cause. Below-band rates are filed on 45 days' notice and must be accompanied by a showing that the rates cover the average variable costs and are otherwise just, reasonable, and nondiscriminatory.[47] Pricing bands are intended to protect ratepayers from substantial and precipitous changes in services rates, and to prevent the LECs from engaging in predatory pricing and other anti-competitive practices.[48] Commenters opposing the subdivision of a new video dialtone basket into service categories subject to pricing bands should discuss whether some other regulatory mechanism is needed to limit a LEC's ability to raise or lower rates within the basket.

**4. Sharing Issues**

22. Under price cap regulation, a LEC is required to adjust its PCIs downward if its rate of return for the preceding calendar year exceeds 12.25 percent or, in some cases, 13.25 percent,[49] and may adjust its PCIs upward if its rate of return for that period falls below 10.25 percent.[50] The sharing and lower end adjustment mechanisms are intended to compensate for

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Part 69 of the Commission's Rules, 6 FCC Rcd 6095, 6098 (1991) (allowing carriers to receive Part 69 waivers to offer Line Identification Database (LIDB) services prior to the establishment of a permanent rate structure).

[47] *LEC Price Cap Order*, 5 FCC Rcd at 6788, 6822-24.

[48] *LEC Price Cap Order*, 5 FCC Rcd at 6788, 6811, 6813-14; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 617.

[49] The 12.25 benchmark applies to LECs that operate with a 3.3 productivity offset. LECs that elect the more challenging 4.3 productivity offset do not have to make a sharing adjustment unless their rate of return exceeds 13.25 percent. *LEC Price Cap Order*, 5 FCC Rcd at 6788, 6801-2.

[50] For example, under the sharing adjustment, a LEC that uses the 3.3 percent productivity offset must share with its customers half of its earnings between 12.25 percent and 16.25 percent, and all of its earnings in excess of 16.25 percent. Under the lower end adjustment, a LEC that posts earnings below 10.25 percent is entitled to adjust its rates upward to target

the possibility of an error in the choice of the productivity factor and performance variations among the different LECs.[51] The sharing and lower end adjustments are made as one-time adjustments to a single year's rates.[52]

23. The Commission concluded in the *LEC Price Cap Order* that a carrier's sharing obligation would be based on its total interstate earnings.[53] The customer's share plus interest is returned through a one-time reduction in the PCI for the next rate period, calculated in the same manner as other exogenous changes in the formula.[54] The Commission rejected commenters' arguments that basing sharing on total interstate earnings would provide incentives for LECs to engage in cross-subsidization among service baskets and that sharing should therefore be based on per-basket or per-service earnings. The Commission reasoned that in view of the limitations imposed by the price cap indexes, sub-indexes, and service categories and the requirement that sharing be allocated among the baskets on a cost-causative basis, the commenters' concerns were "at best speculative."[55]

24. If we affirm our tentative conclusion to establish a separate price cap basket, we believe that we should consider whether the costs and revenues associated with this basket should be included with those from the other baskets to compute a LEC's interstate earnings. We have previously noted our objective of ensuring that video dialtone costs are not recovered through charges for other interstate access services.[56] Our decision to adopt a uniform sharing mechanism for all baskets was based in part on our decision to adopt a unitary productivity offset,[57] and we have raised the issue here of whether the productivity factor set forth in the

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earnings to 10.25 percent (the "lower end adjustment") in the following year. *Id.*

[51] *See, e.g., Price Cap Performance Review Notice*, 9 FCC Rcd at 1689.

[52] *LEC Price Cap Order*, 5 FCC Rcd at 6803; *see also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2691 n.166.

[53] *LEC Price Cap Order*, 5 FCC Rcd at 6805; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2677.

[54] *LEC Price Cap Order*, 5 FCC Rcd at 6801; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2686; *see also* Section 61.45(d)(4) of the Commission's Rules; *1992 Annual Access Tariff Filings*, 7 FCC Rcd 4731, 4733 (Com. Car. Bur. 1992) (The Common Carrier Bureau "require[d] that LECs allocate their [sharing] adjustments to all price cap baskets based on the proportion of total revenue in each basket to total interstate revenue.").

[55] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2680.

[56] *Video Dialtone Reconsideration Order* at para. 195.

[57] *LEC Price Cap Order*, 5 FCC Rcd at 6805.

*LEC Price Cap Order* should be applied to video dialtone.[58] While we rejected arguments to exclude LEC interexchange earnings from the calculation of total interstate earnings that define LEC sharing obligations, we did exclude the earnings and costs of services excluded from the price cap plan from such calculations.[59]

25. We request comment on whether the costs and revenues associated with video dialtone should be included in the calculation of a LEC's interstate rate of return for purposes of the sharing and low end adjustment mechanisms. Inclusion of these costs and revenues will change a LEC's earnings whenever the return earned on video dialtone is different from the return on other interstate services. In some circumstances, the change may be significant enough to move a LEC's total interstate earnings into or out of the sharing zones or into or out of the low end adjustment area. In view of these different possible outcomes, we seek comment on whether our price cap and video dialtone public interest goals would be served by including the costs and revenues of video dialtone service with the costs and revenues of other price cap baskets in calculating a LEC's interstate earnings for purposes of the sharing and low end adjustment mechanisms. More generally, we seek comment on whether our existing and proposed price cap mechanisms, including a separate video dialtone basket, fulfill our commitment "to implement[] video dialtone in a manner that does not subject basic telephone ratepayers to unreasonable rate increases or allow improper cross-subsidization."[60]

## IV. PROCEDURAL MATTERS

### A. Ex Parte Rules -- Non-Restricted Proceeding

26. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[61]

### B. Regulatory Flexibility Act

27. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers subject to price cap

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[58] *See supra* paras. 11-13.

[59] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2681-82.

[60] *Video Dialtone Reconsideration Order* at para. 162; *see also id.* at para. 217 (recognizing need to take into account all costs resulting from a carrier's decision to provide video dialtone).

[61] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

regulation for local exchange access services affected by the rule amendments under consideration generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of the Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

### C. Comment Filing Dates

28. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[62] interested parties may file comments on or before April 17, 1995, and reply comments on or before May 17, 1995. To file formally in this proceeding, parties must file an original and four copies of all comments, reply comments, and supporting comments. If parties want each Commissioner to receive a personal copy of their comments, parties must file an original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Service, Inc., Room 246, 1919 M Street, N.W., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

## V. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 215, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, a NOTICE IS HEREBY GIVEN OF the rulemaking described above and that COMMENT IS SOUGHT on the issues contained therein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Secretary

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[62] 47 C.F.R. §§ 1.415, 1.419.